7 Otto. 287
Oct. T. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~873.~~ 137

CHRISTIAN H. LILIENTHAL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED SEPTEMBER 28, 1875.

SUPREME COURT OF THE UNITED STATES.

No. 373.

CHRISTIAN H. LILIENTHAL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

INDEX.

	Original.	Print.
Writ of error to United States circuit court	1	1
Clerk's certificate	2	1
Writ of error to United States district court	3	2
Complaint	6	2
Bill of exceptions	9	3
Motion in arrest of judgment	79	40
Verdict	81	41
Order denying motion in arrest	82	41
Judgment	84	42
Citation	86	43
Bond	88	43
Hearing in circuit court	91	44
Decision	92	44
Judgment	93	45
Petition for writ of error	95	45
Bond	99	46
Citation	101	48

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between A Quantity of Manufactured and Unmanufactured Tobacco, Tools, and other Personal Property, and Christian H. Lilienthal, plaintiff in error, and The United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Christian H. Lilienthal as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) Filed May 22, 1875. Writ of error.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to ninety-seven inclusive, contain a true and complete transcript of the record and pro-
3 ceedings had in said court in the case of A Quantity of Manufactured and Unmanufactured Tobacco, Tools, and other Personal Property, and Christian H. Lilienthal, plaintiff in error, and The United States of America, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundredth.

KENNETH G. WHITE, *Clerk.*

1 UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between A Quantity of Manufactured and Unmanufactured Tobacco, Tools, and other Personal Property, and Christian H. Lilienthal, plaintiff in error, and The United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Christian H. Lilienthal as is said and as appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capital in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the second Monday of October next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this twentieth day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) Filed May 22, 1875. Writ of error.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the following pages, numbered from one to ninety-seven inclusive, contain a true and complete transcript of the record and pro-
3 ceedings had in said court in the case of A Quantity of Manufactured and Unmanufactured Tobacco, Tools, and other Personal Property, and Christian H. Lilienthal, plaintiff in error, and The United States of America, defendants in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern district of New York, in the second circuit, this fifteenth day of September, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the said United States the one hundredth.

KENNETH G. WHITE, *Clerk.*

4 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judge of the district court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition
5 of the judgment of a plea which is in the said district court before you, between The United States by libel in rem. against Certain Manufactured and Unmanufactured Tobacco, Tools, and other Personal Property, and Christian H. Lilienthal, claimant, a manifest error hath happened, to the great damage of the said Christian H. Lilienthal, as is said and as appears by his complaint hereto annexed, we, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the circuit court of the United States, at the United States court-rooms in the city of New York, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the fifth day of June, 1872, that, the record and proceedings aforesaid being inspected, the said justices may cause further to be done therein to correct the error what of right and according to the law and custom of the United States ought to be done.

Witness the honorable Salmon P. Chase, Chief-Justice of the Supreme Court of the United States, this first day of June, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

[L. S.] KENNETH G. WHITE, *Clerk.*

The foregoing writ of error is allowed, June 1st, 1872.

SAML. BLATCHFORD,
District Judge.

6 The return to the within writ of error appears in the following papers and proceedings:

Dated New York, June 4th, A. D. 1872.

[L. S.] GEO. F. BETTS,
Clerk of the District Court of the United States of America for the Southern District of New York.

(Endorsed:) A. 165–202. U. S. circuit court. The United States against A Quantity of Tobacco, &c. C. H. Lilienthal, claimant. Writ of error. Norris & Lord, attorneys for claimant, 171 Broadway, New York. Geo. T. Curtis, esq., of counsel. Rec'd June 1st, 1872.

UNITED STATES OF AMERICA:

To the honorable the justices of the circuit court of the United States within and for the southern district of New York:

Complaining, showeth unto your honors, Christian H. Lilienthal, that in the district court of the United States for the southern district
7 of New York, under a libel for information and seizure, filed by and in the name of the United States, certain manufactured and unmanufactured tobacco, and certain tools, and other personal property

were, by the judgment of the said district court rendered on the twenty-fifth day of May, A. D. 1872, declared to be forfeited to the United States, for certain alleged causes in the said information set forth, the same being the property of this complainant at the time of seizure, and being duly claimed by him in the said proceeding, and that in the record and proceedings, and in the rendition of the judgment aforesaid, manifest error hath happened, to the great damage of the complainant, in this, to wit:

First. That because the said judgment was rendered and entered without any verdict of the jury empanneled to try the issues between the United States and the complainant, having been duly and lawfully returned, and affirmed and recorded before the jury were discharged, as is fully set forth in a motion for arrest of judgment, filed by this complainant in the said district court, and overruled by the presiding judge, and now remaining of record in the said district court.

Second. Because in the trial of the issues between the United States and this complainant, under the information aforesaid, and in charging and instructing the jury empanneled to try the same, certain errors were committed by the presiding judge of the said court, as will fully and specially appear by the bill of exceptions, duly signed and sealed by the said judge, and now remaining of record in the said district court.

Wherefore this complainant prays that a writ of error may be issued out of this honorable court to remove into this court the record of the judgment aforesaid, to the end that the error therein appearing
8 may be corrected, as of right and according to the law and custom of the United States, and that justice in the premises may be done.

Signed at the city of New York, in the said southern district of New York, on this first day of June, 1872.

CHRISTIAN H. LILIENTHAL.

(Endorsed:) A. 165-202. U. S. circuit court. The United States against A Quantity of Tobacco, &c., and C. H. Lilienthal. Complaint. Norris & Lord, attorneys for complainant, 171 Broadway, New York. Recd. June 1st, 1872.

9 U. S. district court, southern district of New York.

THE UNITED STATES *vs.* A QUANTITY OF MANUFACTURED AND UNMANUFACTURED Tobacco and other Personal Property. Christian H. Lilienthal, claimant.	Bill of exceptions.

Be it remembered that on the 27th day of March, 1868, the Hon. Samuel G. Courtney, district attorney of the United States for this district, filed in this court an information of seizure, in the words and figures following, to wit:

District court of the United States of America for the southern district of New York, of March term, in the year one thousand eight hundred and sixty-eight.

Before the honorable Samuel Blatchford, the district judge.

On the 27th day of March, in the year one thousand eight hundred and sixty-eight, comes Samuel G. Courtney, as the attorney of the

United States for the said southern district of New York, in a cause of seizure on land under the internal-revenue laws of the United States, and informs the court—

That J. F. Bailey, collector of internal revenue for the fourth col-
10 lection-district of the State of New York, heretofore, to wit, on the 25th day of March, in the year one thousand eight hundred and sixty-eight, on land within the city of New York, within the said collection-district, and within the southern district of New York, seized the following-described property for a forfeiture incurred under the laws of the United States, that is to say, a quantity of manufactured tobacco and certain tools, vessels, utensils, implements, instruments, etc., etc., being all the personal property found at the tobacco-manufactory of C. H. Lilienthal, 221 Washington street, and now has the same in custody within such southern district, as forfeited to the United States for the following causes:

That prior to said seizure taxes were imposed by the provisions of law upon the said tobacco, and the same being so subject to the payment of taxes as aforesaid, were found by the said collector in the possession and custody, and within the control, of some person or persons to the said attorney unknown, for the purpose of being sold and removed by such person or persons, in fraud of the internal-revenue laws, and with design to avoid payment of said taxes, against the 48th section of the act of Congress, approved June 30, 1864, entitled "An act to provide internal revenue to support the Government, to pay interest on the public debt, and for other purposes," as amended by act of July 13, 1866.

That the said articles of raw material were found in the possession of some person or persons to the said attorney unknown, the said person or persons then and there intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, and with design to evade the payment of said tax, against the 48th section aforementioned as amended as afore-
said.

11 That the said tools, implements, instruments, and personal property were found in the place or building, and within certain yards and enclosures where said tobacco and said raw materials were found as aforesaid, whereby they became liable to forfeiture by the provisions of the 48th section aforesaid as amended as aforesaid.

And the said attorney of the United States, on behalf of the United States, said that all and singular the premises are true, and that by reason thereof, and by force of the statutes in such case made and provided, the aforementioned goods, wares, and merchandise became and are forfeited to the use in the said statutes provided.

Wherefore he prays that due process issue in that behalf, as well of attachment to bring the said property within the custody of the court as of monition to all parties in interest to appear on the return of such process and duly intervene herein by claim and plea to the premises; and due proceedings being had thereon, that, for the causes aforesaid, the said goods, wares, and merchandise be condemned by decree of forfeiture, and the proceeds of the sale, or such other disposition thereof as the court shall direct, distributed according to law.

SAMUEL G. COURTNEY,
United States Attorney for the Southern District of New York.

And thereupon, to wit, on the fourth day of April, 1868, Christian H. Lilienthal filed in this court his claim to the said property, in the words and figures following, to wit:

12 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Saturday, the fourth day of April, in the year of our Lord one thousand eight hundred and sixty-eight:

Present, the honorable Samuel Blatchford, district judge.

A QUANTITY OF MANUFACTURED TOBACCO, &c., &c., found at No. 221 Washington st.,
agst.
THE UNITED STATES.

And now Christian H. Lilienthal, owner of the above-named property, invervening for the interest of himself in the said property, appears before the honorable court and makes claim to the said property, &c., as the same are attached by the marshal, under the process of this court, at the instance of the United States; and the said avers that he was in possession of the said property at the time of the attachment thereof, and that he is the true and bona-fide owner of the said property, and that no other person is the owner thereof; wherefore he prays to defend accordingly.

CHRISTIAN H. LILIENTHAL.

13 Sworn to and subscribed this 4th day of April, A. D. 1868, before me.

GEO. F. BETTS,
U. S. Commissioner.

STEPHEN D. STEPHENS, JR.,
Proctor for Claimants.

And afterwards, to wit, on the fourth day of June, 1868, the said Christian H. Lilienthal filed in this court his answer to the said information in the words and figures following, to wit:

In the district court of the United States for the southern district of New York.

THE UNITED STATES
vs.
A QUANTITY OF MANUFACTURED TOBACCO found at tobacco-factory of C. H. Lilienthal, 221 Washington street.

And now Christian H. Lilienthal, the claimant of the said goods, wares, and merchandise, for answer to the libel of information filed against the same, comes and answers the said information as follows:

The said claimant denies that the said goods, wares, and merchandise, or any part thereof, became or are forfeited in manner and form in the said information alleged.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys for Claimant.

14 And afterwards, to wit, on the 1st day of May, 1868, the property so seized was duly appraised and delivered to the said claimant as of the value of $104,391.78 on his bond, executed with sufficient sureties, now on file in this court, in the penal sum of , and conditioned, &c.

And afterwards, to wit, on the tenth day of April, 1871, at a term of this court, begun and holden at the city of New York, on, to wit, on the fourth day of April, 1871, a jury was duly empanelled and sworn to try the issues between the United States and the claimant, under the information, claim, and answer aforesaid, the United States being represented by Thomas Simons, esq., assistant United States district attorney for the southern district of New York, and the claimant being represented by Benjamin K. Phelps, esq., and Messrs. Harland & Rollins; and the trial of the cause being continued from day to day until the 8th day of May, 1871, the same was committed to the jury by the charge of the presiding judge, after argument by counsel on both sides.

And in the course of said trial, and before the cause was finally committed to the jury, the counsel for the claimant did take and allege sundry exceptions to the rulings and charge of the court, and to the refusals of the court to give certain instructions to the jury, as then and there prayed for by him, which said exceptions are hereinafter severally set forth.

I.

To maintain the issues on the part of the United States, the district attorney gave evidence tending to show that the claimant was a manufacturer and seller of tobacco in the city of New York, at and for a long time prior to the seizure in the information set forth, namely, prior to the 25th day of March, 1868, and that at the time of the seizure
15 the claimant had in his possession, at his manufactory, at Nos. 217, 219, and 221 Washington street, New York, the several quantities of manufactured tobacco and of raw materials, and the other personal property described in said information, and attached by the marshal, and claimed and released to the claimant as aforesaid; and that said manufactured tobacco was tobacco manufactured by the claimant, of a kind made subject to tax, and declared to be taxable by the provisions of the internal-revenue law in force at the time the same was so found in the possession of the claimant, and that the said raw materials then and there were intended to be manufactured by the claimant into articles of a kind subject to tax by such provisions of law; and that the claimant, at the time of the seizure, had in his possession the manufactured tobacco and raw materials so seized for the purpose of selling and removing the said manufactured tobacco in fraud of the internal-revenue laws, and with design to avoid payment of said taxes, and of manufacturing the said raw materials into articles of a kind so subject to tax for the purpose of fraudulently selling such manufactured articles, and with design to evade the payment of said tax, and with a view to prove that the same were liable to seizure and forfeiture, and were forfeited, under the 48th section of the internal-revenue act of June 30th, 1864, the district attorney gave evidence tending to show the following acts and omissions of the claimant prior to the seizure aforesaid, which it was contended by the district attorney were acts or omissions in fraud and violation of the internal-revenue laws in force at the time of such acts or omissions, and from which, it was also contended by the said district attorney, the jury might infer an intent, on the part of the claimant, to sell or remove the manufactured tobacco so seized, in fraud of the internal-revenue laws as aforesaid, and with the design aforesaid, and to manufacture the said raw materials as aforesaid, for the
16 purpose and with the design aforesaid, contrary to the provisions

of the internal-revenue laws, and especially of the said 48th section of the act of June 30th, 1864, as amended, &c., namely:

The said U. S. attorney gave evidence tending to prove that the claimant, during the seventeen months succeeding August 1, 1866, (on which date the internal-revenue act of July 13, 1866, changing, in some respects, the rates of tax upon manufactured tobacco, took effect,) manufactured at his said factory, and sold therefrom in each month large quantities of a kind of manufactured tobacco which he had manufactured and returned for taxation prior to said August 1, 1866, and paid tax on, as subject to a tax of thirty-five cents per pound under the then existing law, but which, after said date, he returned for taxation on his returns for each of said seventeen months, (and paid tax upon,) as subject by said act of July 13, 1866, to a tax of fifteen cents per pound, (while he knew and believed that said tobacco was subject to a tax of forty cents per pound by the said act.)

And the said attorney put in evidence a certain paper document, commonly known as a tobacco-manufacturer's monthly return, which was marked by the court as an exhibit, "No. 1," and which is of the tenor following:

And afterwards, to wit, on the tenth day of April, 1871, at a term of this court, begun and holden at the city of New York, on, to wit, on the fourth day of April, 1871, a jury was duly empanelled and sworn to try the issues between the United States and the claimant, under the information, claim, and answer aforesaid, the United States being represented by Thomas Simons, esq., assistant United States district attorney for the southern district of New York, and the claimant being represented by Benjamin K. Phelps, esq., and Messrs. Harland & Rollins; and the trial of the cause being continued from day to day until the 8th day of May, 1871, the same was committed to the jury by the charge of the presiding judge, after argument by counsel on both sides.

And in the course of said trial, and before the cause was finally committed to the jury, the counsel for the claimant did take and allege sundry exceptions to the rulings and charge of the court, and to the refusals of the court to give certain instructions to the jury, as then and there prayed for by him, which said exceptions are hereinafter severally set forth.

I.

To maintain the issues on the part of the United States, the district attorney gave evidence tending to show that the claimant was a manufacturer and seller of tobacco in the city of New York, at and for a long time prior to the seizure in the information set forth, namely, prior to the 25th day of March, 1868, and that at the time of the seizure
15 the claimant had in his possession, at his manufactory, at Nos. 217, 219, and 221 Washington street, New York, the several quantities of manufactured tobacco and of raw materials, and the other personal property described in said information, and attached by the marshal, and claimed and released to the claimant as aforesaid; and that said manufactured tobacco was tobacco manufactured by the claimant, of a kind made subject to tax, and declared to be taxable by the provisions of the internal-revenue law in force at the time the same was so found in the possession of the claimant, and that the said raw materials then and there were intended to be manufactured by the claimant into articles of a kind subject to tax by such provisions of law; and that the claimant, at the time of the seizure, had in his possession the manufactured tobacco and raw materials so seized for the purpose of selling and removing the said manufactured tobacco in fraud of the internal-revenue laws, and with design to avoid payment of said taxes, and of manufacturing the said raw materials into articles of a kind so subject to tax for the purpose of fraudulently selling such manufactured articles, and with design to evade the payment of said tax, and with a view to prove that the same were liable to seizure and forfeiture, and were forfeited, under the 48th section of the internal-revenue act of June 30th, 1864, the district attorney gave evidence tending to show the following acts and omissions of the claimant prior to the seizure aforesaid, which it was contended by the district attorney were acts or omissions in fraud and violation of the internal-revenue laws in force at the time of such acts or omissions, and from which, it was also contended by the said district attorney, the jury might infer an intent, on the part of the claimant, to sell or remove the manufactured tobacco so seized, in fraud of the internal-revenue laws as aforesaid, and with the design aforesaid,
and to manufacture the said raw materials as aforesaid, for the
16 purpose and with the design aforesaid, contrary to the provisions

of the internal-revenue laws, and especially of the said 48th section of the act of June 30th, 1864, as amended, &c., namely:

The said U. S. attorney gave evidence tending to prove that the claimant, during the seventeen months succeeding August 1, 1866, (on which date the internal-revenue act of July 13, 1866, changing, in some respects, the rates of tax upon manufactured tobacco, took effect,) manufactured at his said factory, and sold therefrom in each month large quantities of a kind of manufactured tobacco which he had manufactured and returned for taxation prior to said August 1, 1866, and paid tax on, as subject to a tax of thirty-five cents per pound under the then existing law, but which, after said date, he returned for taxation on his returns for each of said seventeen months, (and paid tax upon,) as subject by said act of July 13, 1866, to a tax of fifteen cents per pound, (while he knew and believed that said tobacco was subject to a tax of forty cents per pound by the said act.)

And the said attorney put in evidence a certain paper document, commonly known as a tobacco-manufacturer's monthly return, which was marked by the court as an exhibit, "No. 1," and which is of the tenor following:

EXHIBIT No. 1.

(No. 1. April 11, 1871. S. B.)

UNITED STATES INTERNAL REVENUE.

TOBACCO AND SNUFF MANUFACTURER'S MONTHLY RETURN.

[To be returned to the assistant assessor on or before the 10th day of each month, and the tax paid on or before the last day of the month.]

Account of the quantity and description of tobacco of all descriptions, including snuff, manufactured, sold, consumed, or removed from the manufactory, or removed under bond, and of all purchased by C. H. Lilienthal, in the fifth division of the fourth district of the State of New York, at Nos. 217, 219, and 221 Washington street, New York, with all leaf-tobacco and stems, licorice, and tin-foil purchased and sold during the month of August, 1866.

Quantity and description of goods sold or removed of our own manufacture.	Rate of tax.	Pounds manufactured.	Pounds removed in bond.	Tax. Dolls.	Tax. Cts.	Pounds sold or removed tot in bond.	Tax. Dolls.	Tax. Cts.
Fine-cut chewing	40 cts.	18, 472¼	None.	None.	None	18, 472¼	$7, 389	10
Plug or twist tobacco, and all kinds not otherwise provided for	40 cts.	.....	"	"	"	.....	.....	.....
Smoking-tobacco, sweetened, stemmed, or butted	40 cts.	.....	"	"	"	.....	.....	.....
Smoking-tobacco, not sweetened, stemmed, or butted, including that made of stems	15 cts.	16, 258¾	"	"	"	16, 258¾	2, 438	81
Tobacco twisted by hand or prepared for use, and not pressed, sweetened, or otherwise prepared, and fine-cut shorts	30 cts.	2, 518	"	"	"	2, 518	755	40
Prepared snuff, or any substitute	40 cts.	681 3-16	"	"	"	681 3-16	272	48
Total	.....	.....	.....	.....	.....	.....	$10, 855	78

I, C. H. Lilienthal, do swear that the within statement contains, to the best of my knowledge and belief, a true and complete account of all the tobacco and snuffs manufactured, purchased, consumed, sold, or removed from the manufactory or removed in bond, during the period specified; and also all the leaf-tobacco, stems, licorice, and tin-foil purchased and sold during the same period; and that I have taken all the means in my power to make said account complete and correct in each and every particular.

(Signed)

C. H. LILIENTHAL.

Sworn before me this 10th day of September, A. D., 1866.

SAML. N. LECOMTE,
Assistant Assessor.

Quantity and description of goods purchased and sold not of our own manufacture.	Pounds leaf-tobacco for cutting or plug.	Pounds Spanish-leaf tobacco.	Pounds seed-leaf tobacco.	Pounds tobacco stems.	Pounds snuff-flour.	Pounds prepared snuff.	Pounds Scotch snuff.	Pounds plug or twist.	Pounds tobacco in process of manufacture.	Pounds cut chewing-tobacco.	Pounds cut or prepared smoking-tobacco.	Pounds cut stem with no leaf in.	Pounds fine-cut shorts.	Pounds licorice.	Pounds tin-foil.
Purchased during this month	27, 675	None.	None.	None.	None.	None.	1,388	3, 666	None.	None.	None.	None.	None.	1, 970	6, 005¾
Sold during this month	.....	"	"	"	"	"	398 10-16	2, 239	"	"	"	"	"	.....	.....

And the same was proven to have been made and verified by the claimant and furnished by him to the assistant assessor of the assessment-district in which his said factory was situate, as and for his return, under oath, of the products and sales or delivery of his tobacco manufacture for the month of August, 1866, in form and detail as was required and prescribed by the Commissioner of Internal Revenue.

19 And the said attorney further put in evidence sixteen other like paper documents or monthly returns, which were marked by the court consecutively, as exhibits, by the marks "No. 2" to "No. 17," inclusive, and were proven to have been made, verified, and furnished in like manner as said No. 1, and to be each a like return of the claimant for one of the sixteen months succeeding the said month of August, 1866.

It appeared upon each of the said seventeen returns that the claimant had entered and returned a certain quantity of tobacco as manufactured by him, and sold or removed, of the description on said return of "Smoking-tobacco, not sweetened, stemmed, or butted, including that made of stems," and subject by said act of July 13th, 1866, to a tax of fifteen cents per pound, and the amount of the tax payable thereon at that rate. It was also shown that the amounts of tax so returned as payable on the said respective quantities of tobacco, and no more, had been paid by the claimant thereon.

And the said attorney produced evidence tending to show that of the quantity of manufactured tobacco so returned on each of the said seventeen returns under the said description, as subject to a tax of fifteen cents per pound, a large proportion, averaging not less than five thousand pounds on each return, was of a kind of manufactured tobacco advertised in his price-lists and sold by the claimant during and prior to said seventeen months, under the particular designation of "Extra-long smoking-tobacco." C. W. Dennerker, foreman of the claimant's factory, called as a witness by said attorney, described the process of manufacturing the said "Extra-long smoking-tobacco" during said period as follows: The manufactured tobacco sold by the claimant as extra-long smoking-tobacco was made by putting in the cut-

20 ting-machines, in certain proportions, what are called "fillers" and pieces of stem about an inch and a half long, and cutting them together under a heavy pressure into fine shreds. The "fillers" for this tobacco were tobacco-leaves which had been "butted" or "stripped." The process of "butting" or "stripping" is to take a tobacco-leaf entire, and, after "casing," that is to say, wetting it, to remove, by cutting and drawing out from it one-half to three-fourths in length of the woody central stem that runs through the leaf from end to end, the object being to leave as much of such stem in the leaf at the top of it as would not be noticeable in the product after cutting. The pieces of "stem" put into the cutting-machines had also been subjected previously to certain processes, as follows:

The portions of stem removed from the natural leaf, in the manner before described, are passed between heavy rollers, by which they are broken up into pieces, which are then "cased," or soaked in certain dye-stuff, to assimilate their color to that of the pure leaf, but no sweetening is used; after which they are again crushed between the rollers, coming out in pieces of about an inch and a half long. This product is dried on screens, and there lies in a heap, until wanted for use in the cutting-machines. After passing with the fillers through the cutting-machines, the product goes to the dressers, who shake the fibres apart, and it is spread out on screens or dryers to dry. When fully prepared,

it is put up for sale in packages of paper or foil, and is also largely sold loose in bulk. Large quantities of this tobacco were sold in each of the seventeen months from August, 1866, to December, 1867, both inclusive. The witness further testified that the manufacture of tobacco, substantially as above described, had been carried on in claimant's factory for several years prior to said seizure, the only difference being that prior to about August 20, 1866, the proportion of the crushed stem to
21 the fillers put in the cutting-machines was about twenty pounds of such crushed stem in each machine-box containing ninety pounds of fillers and crushed stem, while, after said date, the average fillers to crushed stems in such machine-box was two pounds of fillers to one pound of crushed stem; and that it having been ascertained by experiment that the average proportion, by weight, of the butts or portions of stem extracted from the leaf for making this extra-long smoking-tobacco, was one-fourth of the weight of the entire leaf, it was intended, in the manufacture of such tobacco, after August 20, 1866, to cut up, with a given weight of the fillers, at least as much of crushed stem as would equal in weight the average quantity of the stems taken out of such fillers. It did not appear, from the description of the witness, that the identical stem taken out of a given quantity of tobacco was always used, together with the leaf from which it had been taken. The result of the process was that when the tobacco was finished for sale the stem which it contained was not distinguishable from the leaf. The witness further testified that, prior to August 1, 1866, the said tobacco had, for some portion of the time, been designated and sold as "extra-long smoking and chewing tobacco," and had been entered by the claimant, in the monthly returns of sales and removals of manufactured tobacco, prior to such date made by him to the assessor for taxation under the classification upon such returns as "smoking-tobacco," and as subject, under the existing law, to taxation at the rate of thirty-five cents per pound. That upon the monthly returns made for August, 1866,, of sales and removals of manufactured tobacco during that month, the extra-long smoking-tobacco sold, or removed for sale, manufactured prior to August 20, 1866, and containing a somewhat smaller proportion of said crushed stem, was entered upon the said returns as "chewing-tobacco," under the classification in said return
22 of "fine-cut chewing," and as subject, by said act of July 13, 1866, to a tax of forty cents per pound, and was entered by a like designation in the book hereinafter referred to, marked "Exhibit 138 A;" that upon said seventeen returns of said sales and removals, the extra-long smoking-tobacco sold or removed for sale, manufactured after August 20, 1866, containing the larger proportion of crushed stem aforesaid, was entered upon the said returns as smoking-tobacco, under the classification, in said returns of "smoking-tobacco not sweetened, stemmed, or butted, including that made of stems," and as subject, by said act of July 13, 1866, to a tax of fifteen cents per pound. The witness further testified that leaf-tobacco is "stemmed," in the understanding of tobacco-manufacturers, when the whole of the central stem has been removed from the leaf, and that it is "butted" when the thick end or lower portion of said stem is cut and drawn out of the leaf, leaving more or less of the upper part of the stem still in the leaf, and that it was not practicable, in the process described by him by which the said extra-long smoking-tobacco was manufactured, to restore to or replace with any particular leaf or quantity of leaves the identical portion or portions of stem that had been extracted therefrom.

It also appeared from an examination of the complainant's books of

accounts in evidence, that the extra-long smoking-tobacco manufactured prior to August 20, 1866, and returned as "fine-cut chewing" tobacco, subject to a tax of forty cents per pound, was sold by the claimant to his customers for seventy cents per pound, and that said obacco, manufactured after said date and returned under the classification of smoking-tobacco not sweetened, stemmed, or butted, including that made of stem, subject to a tax of fifteen cents per pound, was sold by the claimant to his customers for sixty cents per pound.

23 The claimant's counsel introduced in evidence the following correspondence between the United States assessor and the Commissioner of Internal Revenue, and the same was read to the jury:

"ASSESSOR'S OFFICE, UNITED STATES INTERNAL REVENUE,
"FOURTH DISTRICT, NEW YORK,
"*New York, March* 23, 1867.

"SIR: Mr. C. H. Lilienthal, manufacturer of tobacco in this district, claims to be liable only to a tax of 15 cents per pound on certain smoking-tobacco manufactured by him.

"He describes the process as follows, and represents that he strictly adheres to the same in the manufacture of the tobacco:

"First, he 'strips' the stems from the leaves, then dyes them and presses them flat between heavy rollers, and in some cases with an additional amount of stem (refuse from manufactured chewing-tobacco) to the leaf, and both together put into the machine and finished by cutting.

"Mr. Lilienthal claims, therefore, that this manufactured smoking-tobacco is not liable to the tax of 40 cents per pound. If the stemming and butting of tobacco consists in the permanent removal of the stem, it might be held that smoking-tobacco manufactured as above described is not liable to the 40 cents tax, inasmuch as the stem is not permanently removed, but the manufacturing process finished by cutting stem and leaf together in as great a proportion, at least, of stem to leaf as existed previous to the stripping of the stem for dyeing and rolling.

"I understand the Department to rule that if tobacco, cut as
24 represented by Mr. Lilienthal, is further manufactured by any process of screening or sifting the broken or cut stem from the same before being offered for sale, that it is liable to the 40 cents tax.

"What tax is smoking-tobacco subject to when manufactured by cutting the replaced stem with the leaf from which it had been previously removed for drying and pressing without any further finishing process?

"Mr. Lilienthal has made returns of his tobacco, prepared as aforesaid, and, as he states, as liable to the 15 cents tax per pound, and has been assessed accordingly, the process of manufacture not having been made known to me previous to the assessment for February last.

"Respectfully,
(Signed) "PIERRE C. VAN WYCK,
"*Assessor.*

"Hon. E. A. ROLLINS,
"*Com'r Internal Revenue, Washington, D. C.*"

"TREASURY DEPARTMENT, OFFICE OF INTERNAL REVENUE,
"*Washington, August* 26, 1867.

"SIR: The question which has been for some time under consideration relative to the tax upon a certain class of tobacco manufactured by C. H. Lilienthal, has been so far decided that it is held that if the tobacco

is in point of fact, when sold by Mr. Lilienthal, smoking-tobacco, not sweetened, and so manufactured as to contain all, or more than all, the stems that grew in the tobacco, it will be subject to the tax of 15 c. per pound.

"Mr. Israel Kimball, who is now in New Hampshire, has been
25 instructed to call upon you on his way through New York, and to render you such assistance as he can for the final settlement of the question.

"Very respectfully,

(Signed) "THOMAS HARLAND,
"*Deputy Commissioner.*

"P. C. VAN WYCK, Esq.,
"*Assessor 4th District, New York.*"

The said U. S. attorney also gave evidence tending to show that P. C. Van Wyck, esq., the said assessor mentioned in the foregoing correspondence, and who received the said letter of Thomas Harland, deputy commissioner, did not exhibit the same, nor communicate the contents of any part thereof, to the said claimant until some time after the commencement of an examination of the books of the said claimant with reference to the charges in this suit instituted about the first of December, 1867; that said claimant and his agents gave to the proper officers of the revenue no other information as to how the extra-long smoking-tobacco so returned as aforesaid for taxation at fifteen cents per pound was manufactured than what is contained in said returns and what is referred to in said letter from said Van Wyck, and that the Commissioner of Internal Revenue had, in September, 1866, published his instructions and opinion that tobacco so manufactured was subject, under the said act of July 13th, 1866, to the tax of forty cents per pound on smoking-tobacco.

And the said U. S. attorney further gave evidence tending to prove that in the months of April and May, 1867, a large quantity in each month, of tobacco manufactured in said factory of the claimant had been removed therefrom for sale, and had not been returned for
26 taxation upon the claimant's return for such months, and had never been lawfully returned for taxation, and that the lawful tax upon the same had never been paid, but that the claimant had, in fraud of the internal-revenue laws and with design to avoid the payment of an anticipated increase in the rate of tax on the said tobacco, in the month of April, 1865, made a certain pretended return for the taxation of the said and certain other tobacco, as sold in March, 1865, in his return for that month and as liable to taxation, when the said claimant knew the same had not been sold and was not returnable for taxation, and that the claimant kept the said tobacco in his said factory and sold and removed the same after April 1, 1865, and during said period of seventeen months, without in any manner returning the same for taxation or paying any tax thereon.

The said attorney introduced evidence tending to show that in the month of April, 1867, the claimant sent out of his factory to one Coleman, in California, for sale, a consignment of 3,600 pounds of manufactured tobacco, of a description manufactured with all the stem in, the leaf not having been butted nor stripped from the stem, and not having been sweetened, and sold by him as smoking-tobacco, under the designation of "pressed Orinoco tobacco;" and in the month of May, 1867, a like consignment of 3,400 pounds of said tobacco; that the said quantities of said tobacco so removed for sale were not returned for

taxation by the claimant, in his monthly returns to the assessor of manufactured tobacco sold or removed for sale for the said months of April and May, 1867, and were never so returned except in the manner following:

The said witness, C. W. Dennerker, testified that the 7,000 pounds of the said Orinoco tobacco, included in the said consignments, had
27 been stored in the lofts of the said factory from a period prior to March, 1865, until sent out to California as aforesaid, and had never been out of the factory in that time. That upon the claimant's monthly return for March, 1865, of sales and removals of manufactured tobacco during said month, he made return of the said 7,000 pounds, with other tobacco of the same kind and of other kinds to a large amount, as sold during said month; that under date of March 31, 1865, there appeared, in a book kept by witness of sales and removals, from which the claimant's book-account of sales and removals for taxation was made up, an entry of 9,000 (pound) boxes of "Orinoco," and a like entry of 3,800 boxes of the said tobacco, and witness believed the said 7,000 pounds consigned as aforesaid formed part of the quantities so entered on his book, and which were included in the monthly return of the claimant for said month of March, 1865. That the said quantities of Orinoco so entered by witness in his said book, which he called the "tax-book," under date of March 31, 1865, were identical with the like quantities which appeared on the claimant's book of sales (in evidence) with other quantities of manufactured tobacco of different kinds, amounting to about $60,000 worth, entered under date of March 8, 1865, as sold to Messrs. Kearney & Waterman, of New York, dealers, on commission, in paper. That a bill of said goods was made out to said Kearney & Waterman, but they were never delivered to them, and said 7,000 pounds of Orinoco never left the factory until shipped to California. That the claimant and said Kearney & Waterman severally exchanged their checks for the amount appearing on said sales-book as the price of said goods. It also appeared in evidence that the Orinoco tobacco returned for taxation upon the return for March, 1865, was returned under the classification of manufactured tobacco, subject by the internal-revenue act of July 30, 1864, to a tax of twenty-five cents per pound, and that the tax
28 thereon at that rate was paid by the claimant; and that other quantities of manufactured tobacco and snuff, included in the said alleged sale, were removed from said factory during said period of seventeen months, without any entry or return of the same for taxation required by law, or the payment of any tax thereon other than as aforesaid; and that no account of the removal for sale of said 7,000 pounds of Orinoco tobacco, and said other quantities of manufactured tobacco and snuff, was kept in book-form as required by law, and no entries of such removals were made in the book in evidence marked Exhibits Nos. 138 and 138 A, hereinafter mentioned.

The said United States attorney afterwards called as a witness the claimant, C. H. Lilienthal, and producing before the witness his sales-book in evidence, and calling the attention of the witness to the said entry therein, under date of March 8, 1865, as of a sale to Kearney & Waterman of the said 9,000 and 3,800 pounds of Orinoco, with other tobacco, concerning which the witness Dennerker had testified as aforesaid, asked the witness whether on or about the 8th day of March, 1865, he made a sale of the 9,000 and 3,800 pounds Orinoco tobacco, so entered to the said Kearney & Waterman. The counsel for the claimant objected to the question, on the ground that its only object was to show that the sale in question was a fictitious sale, and that such evidence

was immaterial, as it appeared that a tax of twenty-five cents per pound had been paid on such tobacco under the act of June 30th, 1864. But the court ruled that the question was proper and the evidence admissible. The claimant's counsel accepted to such ruling, and the exception was noted and allowed, and the said witness, in answer to such question, testified that he sold to said Kearney & Waterman the bill of goods, including the said quantities of Orinoco tobacco so entered in the
29 sales-book as aforesaid; that the said goods were never delivered to said Kearney & Waterman, and were never intended to be delivered to them; nor were they removed from said factory; that it was understood between him and said Kearney & Waterman that the goods were sold and bought back; and he believed, though he was not positive about it, that he exchanged checks with them for the amount of the bill; that this proceeding was for the purpose of returning the said goods as sold in his monthly return for taxation for the month of March, 1865, in order to avoid the payment of an increased rate of taxation which said goods would be liable, under the act of March 3d, 1865, which was to take effect on April 1, 1865.

Upon cross-examination by his counsel, the witness testified that prior to said transaction with Kearney & Waterman, he consulted with Senators Fenton, Morrill, Fessenden, and other members of the Senate Committee on Finance, and with several members of the House Committee of Ways and Means, as to whether, in respect of goods on hand, when the said act of March 3, 1865, should go into effect, he would have a right to return the same for taxation, under the act of June 30, 1864; and that he was advised by them, and by Senator Morrill especially, that he would have such right; that he had no purpose to defraud the Government, but considered that such a transaction warranted him in returning the goods as sold; that all this tobacco was included in and entered upon his monthly return to the assessor for the month of March, 1865, and a tax subsequently paid thereon according to the rates prescribed by the act of June 30, 1864.

The said U. S. attorney further gave evidence tending to prove that the claimant, during the said period, from August 1, 1866, to January 1, 1868, did neglect and refuse to keep in book-form an account
30 of each of the different kinds of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems purchased by him during said period, and of the quantity of tobacco, snuff, snuff-flour, and cigars, of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from the place of manufacture during said period, as required by law.

And the said attorney put in evidence two certain books of account of the claimant, marked by the court as Exhibits "No. 138" and "No. 138 A," and proved that the same were kept during the said period by one Senica S. Davis, in the employ of the claimant as superintendent of his said factory, and specially charged with keeping the said books and making the said returns for taxation, and that said books were the only books kept, as and for the accurate account, in book-form, of the different kinds of tobacco, &c., purchased, manufactured, sold, or removed by the claimant during said period, as required by law. The book "No. 138 A" contained the enteries for the month of August, 1866, and some succeeding months in 1866. The book "No. 138" contained the entries for the remaining months of said period. The entries for each month in said books were kept on a separate page or pages thereof, under a general heading, which in "No. 138" was in writing, and read thus: "Account of tobacco and snuff sold by C. H. Lilienthal in the

year 1867." "No. 138 A" was in print, and read thus: "Quantity of tobacco and snuff sold and consumed, and removed for sale or consumption from the factory." Otherwise the entries in said books were in writing. Under said headings was a line for each week-day of the month, on which was entered, under the descriptions of "chewing," "smoking," "stems," "pure shorts," and "snuff," certain quantities of each of the said articles or kinds of tobacco.

31 It appeared in evidence that the quantities so entered by said Davis were obtained from four books kept by the foreman, Dennerker, which purported to contain a record of quantities of tobacco subject to tax sold at said factory.

There was evidence tending to show that a portion of the entries in said Dennerker's book were made by him immediately after the sale and shipment from the factory of the quantities of manufactured tobacco so entered, and that the residue of said entries represented certain quantities of such tobacco which had not been either sold or removed from the factory at the time of making such entries, but which had, on the day or the day before they were so entered, being taken usually in considerable masses from some part of said factory to a part thereof, on the lower floor, called the retail counter, (hereinafter more particularly described,) to be from time to time thereafter retailed therefrom in small quantities to purchasers. And that of such retail-sales during said period no record was kept, other than a memorandum of the cash received, and no account of such sales was kept by said Dennerker in his books nor by said Davis in the said books kept by him.

There was no account in either of said books "No. 138" and "No. 138 A," during said period, of any quantity of tobacco, snuff, snuff-flour, or cigars of any description manufactured in said factory during said period, though there was evidence tending to show that large quantities of tobacco and snuff had been manufactured therein in each month of said period, and that the attention of the claimant had been called by the assessor to the requirements of the law in respect to keeping such account of the tobacco and snuff so manufactured.

On the part of the claimant, evidence was introduced which it was contended, on his behalf, tended to show that it was impracticable to keep the account required by law of the quantities of tobacco so

32 manufactured, such evidence being evidence as to the mode of manufacture pursued in the claimant's factory and being as follows, as given by the foreman of the claimant's factory:

"We suppose the tobacco is in the cellar in hogsheads. These hogsheads have to be shipped, and it is then tied up in bundles, and each leaf has to be separated from the other; and in the afternoon, if they get sufficient to cure it, they take this tobacco and dip it in water or sweeting, and it is piled upon a board, and it lies there till morning; and the next day it is taken upon the second floor and distributed to a number of women, and they take the stems out of it. That will consume all of that day. Then it is taken down-stairs again over the night, and it takes all the next day to cut it and dress it, and spread it on those screens; and, if we are not in a hurry, it may lie on those screens seven or eight days; and, if we are in a hurry, after we got a lot more, we put heat on it and dry it. That would take about eight hours to get it in such a state that we could put it in piles without heating while in those piles; and if we are cutting this tobacco ahead, we will take it off a little dryer than usual, so as to keep it during warm weather. We have this tobacco on hand until it is sold, and it may take three weeks or a month; and after it has laid in this state in these lofts, after

being dumped from these screens, it is left there for a day and a half or two days on these lofts, until it gets a uniform moisture in it, and it is taken down on the lower floor and put in bins, and it lies there until we sell it; and if we want to use it to-morrow, we take the same tobacco and sprinkle it, and increase the moisture of it, so as to bring it into a saleable condition; and after that it passes from there to the dressers again, and they go to work and shake all the shorts out of it, making long-cut and chewing-shorts. Shorts are the finer parts of the tobacco that don't cling together. It has to pass through a sieve now of 36 meshes to the inch, and from there it goes to the packers again; and after the packers throw out the shorts, it has to be passed up and go through the sieve, and the long-cut has to go to the dressers again."

33 "The process of manufacture is concluded when it is finished and put up in papers and ready for sale, with a strap around it."

"During that process it varies in weight all the time. Every time we handle it we make the shorts I am speaking of; and before we give it to the packers to pack up, we take all the shorts we think necessary to come out, and that reduces the weight again, making two qualities."

"It varies in the amount of moisture in it. We have sometimes to take these piles and dry them out, for they get too damp. In moist weather they will draw damp, and in very dry weather they will get very dry, and we have to increase the moisture."

The said Dennerker also testified that the sales of manufactured tobacco from said factory were made partly in bulk, put up in barrels and cases, partly in packages of certain weights, fixed according to a certain scale prescribed by the officers of internal revenue, the tobacco being put up in wrappers of paper, cloth, tin-foil, or boxes, and that large quantities of tobacco so put up were kept on hand, from which said sales were made.

There was also evidence tending to show that quantities of manufactured tobacco had been purchased during said period, and quantities of purchased manufactured tobacco had been sold and removed from said factory during said period, of which no account had been kept in said books during said period.

It appeared in evidence, and was not disputed, that it was the claimant's practice, prior to and during the year 1867, to enter in the books, Exhibits Nos. 90 and 91, hereinafter mentioned, the sales of tobacco which he had manufactured for sale in the manner above mentioned,

34 as he had from time to time orders for the several kinds of his manufactured goods; and that when he made up the abstracts on the tenth day of each month, required by law, he entered in the said abstracts a column of goods manufactured, as well as one for goods sold and removed for sale, and that both were taken from said books into Exhibits 138 and 138 A, and thence into said abstracts, and that thus the same quantity of goods manufactured and of goods sold appeared in the abstracts.

The said United States attorney further gave evidence tending to prove that during said period, or some parts thereof, the claimant failed to make true returns of the products and sales or delivery of his tobacco manufacture, and true and accurate abstracts of all his purchases of the different kinds of tobacco, and of his sales or removals of purchased or other manufactured tobacco, during said period.

And the said attorney put in evidence a certain paper document, commonly known as a tobacco manufacturer's inventory, which was marked by the court as an Exhibit "No. 18," which is of the tenor following:

INVENTORY OF TOBACCO, SNUFF, AND CIGARS.

(Section 90, act of June 30, 1864.)

Inventory of the quantity and description of manufactured and unmanufactured tobacco, including snuff, snuff-flour, cigars, licorice, tin-foil, and stems, held or owned by C. H. Lilienthal, of New York, county of New York, and State of New York, whose factory is at Nos. 217, 219, and 221 Washington street, on this first day of January, A. D. 1867.

	Pounds leaf-tobacco, for cutting or plug.	Pounds Spanish leaf-tobacco.	Pounds seed-leaf tobacco.	Pounds tobacco-stems.	Pounds snuff-flour.	Pounds prepared snuff.	Pounds inspected plug or twist.	Pounds plug or twist not inspected.	Pounds refuse.	Pounds cut chewing-tobacco.	Pounds cut or prepared smoking.	Pounds cut stem with no leaf in.	Pounds fine-cut shorts.	Pounds pressed tobacco.	Pounds licorice.	Pounds tin-foil.
Amount manufactured, or produced and held, or stored at factory as above	.....	.....	.....	.....	.....	14,114	.....	.....	15,156	11,050	43,679	28,295	61,557	.....	.....	.....
Amount purchased from others and held or stored at factory as above	73,318	105	1,267	11,850	51,379	13,574	10,944	.....	.....	671	6,346	599	.....	.....	1,667	1,079
Amount manufactured or produced, and held or stored elsewhere than at factory	.....	.....	.....	.....	.....	.....	16,985	.....	.....	.....	.....	.....	.....	.....	.....	.....
Amount purchased from others, and held or stored elsewhere than at factory	500,880	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....	.....
Total amount held or owned	574,198	105	1,267	11,850	51,379	27,688	27,929	.....	15,156	11,721	50,025	28,894	61,557	.....	1,667	1,079

	Cigarettes, not over $6 per 100 packgs of 25 each.		Cigarettes or cheroots, not over $13 per M.		Cigars, from $13 to $30.		Cigars, from $30 to $55.		Cigars, from $55 to $85.		Cigars, over $85.		Total quantity cigars.	Total value cigars.
	Quantity.	Value.	Quantity.	Value.	Quantity.	Value.	Quantity.	Value.	Quantity.	Value.	Quantity.	Value.		
Cigars of own manufacture, and stored at factory as above														
Cigars of own manufacture, and stored elsewhere than at factory														
Cigars purchased of others, and stored at factory as above					18,500	486 00	11,800	457 00	3,500	249 00			33,800	$1,192 00
Cigars purchased of others, and stored elsewhere than at factory														

(Signed) C. H. LILIENTHAL.

I, C. H. Lilienthal, do swear that the above is, to the best of my knowledge and belief, a comp lete and correct account of all the tobacco, snuff, snuff-flour, cigars, stems, licorice, and tin-foil held or owned by me on the first day of January, 1867, and that I have taken all the means in my power to make this account complete and correct in each and every particular.

(Signed) C. H. LILIENTHAL.

Sworn to and subscribed before me this 13th day of February, A. D. 1867.

SAML. N. LE COMTE, *A. A.*

Extract of section 90, *act June* 30, 1864.

Any person, firm, company or corporation, now or hereafter engaged in the manufacture of tobacco, snuff, or cigars, of any description whatsoever, shall be, and hereby is, required to make out and deliver to the assistant assessor of the assessment-district a true statement or inventory of the quantity of each of the different kinds of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems held or owned by him or them on the day this act takes effect, or at the time of commencing business under this act, setting forth what portion of said goods was manufactured or produced by him or them, and what was purchased from others, whether chewing, smoking, fine-cut, shorts, pressed, plug, snuff-flour, or prepared snuff, the several kinds of cigars, and the market-price thereof; which statement or inventory shall be verified by the oath or affirmation of such person or persons, and be in manner and form as prescribed by the Commissioner of Internal Revenue. And on the first day of January in every year hereafter shall make out and deliver a true statement or inventory in manner and form as aforesaid.

37 And the same was proven to have been made and verified by the claimant, and delivered by him to the assistant assessor of the assessment-district in which his said factory was situate, as and for a true statement and inventory of the quality of each of the different kinds of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems, held or owned by him on the 1st day of January, 1867, and setting forth what portion of said goods was manufactured or produced by him, and what was purchased from others, in manner and form as prescribed by the Commissioner of Internal Revenue.

And the said attorney further put in evidence a certain other like paper document or inventory, which was marked by the court as an exhibit, "No. 19," and was proven to have been made and verified in like manner as "No. 18" aforesaid, and to be a like statement and inventory of the claimant of the quantity of tobacco, &c., held and owned by him on the first day of January, 1868, setting forth the qualities manufactured or produced and purchased as aforesaid.

It further appeared in evidence that entered upon and included in each of the said monthly returns, "No. 1" to "No. 17," was an abstract of all purchases by the claimant of the different kinds of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems, in the month for which said return and abstract was made, and of all his sales and removals, for consumption or sale or from the place of manufacture, in such month, of tobacco, snuff, snuff-flour, or cigars of whatever description, and that said abstracts, so entered and included, were severally made and verified by the claimant, and furnished to the said assistant assessor, each as a true and accurate abstract of the quantities and particulars aforesaid; and it appeared that the quantities entered in said abstracts were taken from, and were identical with, the entries of such quantities in the monthly records of said books "138" and "138 A."

38 It appeared by the inventory "No. 18" that 11,050 pounds of cut chewing-tobacco, manufactured at said factory, were held and owned there by the claimant on January 1, 1867. It further appeared by the twelve succeeding monthly returns and abstracts "No. 6" to "No. 17," for the several months of the year 1867, that in each of the twelve months a certain quantity of such tobacco had been manufactured in said factory, and an identical quantity had been sold therefrom in the same month.

And it appeared by the inventory "No. 19," that the quantity of such tobacco owned and held in said factory on January 1, 1868, was 16,506 pounds, an amount 5,456 pounds in excess of the quantity stated in the inventory "No. 18" for January 1, 1867.

It appeared, in like manner, by comparison of said inventories and returns and abstracts, that the quantity of fine-cut shorts appearing to be owned and held by the claimant on January 1, 1868, in excess of the quantity appearing by the inventory for January 1, 1867, was 11,804 pounds.

It appeared, in like manner, by comparison of said inventories and returns and abstracts, that the quantity of cut or prepared smoking tobacco manufactured in said factory, held and owned therein by claimant on January 1, 1868, was 16,975 pounds less than the quantity so held and owned therein on January 1, 1867, which quantity of said smoking-tobacco did not appear, and was not accounted for, on the said returns and abstracts, for otherwise, as returned for taxation.

It further appeared, by said inventory "No. 18," that the quantity of cut or prepared smoking-tobacco purchased from others, and held or stored at said factory on January 1, 1867, was 6,346 pounds.

39 It appeared, also, that the quantity entered as manufactured of each kind of manufactured tobacco and snuff in each month of said period was the same quantity as that entered as sold of such tobacco or snuff in each month.

The said U. S. attorney further gave evidence tending to prove that during the said period, from August 1, 1866, to January 1, 1868, large quantities of manufactured tobacco, and particularly of a kind of tobacco known as granulated tobacco, or killickinick, were sold and removed from the said factory by the claimant, without due return thereof for taxation and payment of the taxes thereon as required by law. And the said attorney put in evidence certain books of account of the claimant, marked by the court as Exhibits No. 90 and No. 91, and which were proven to be the books of account, kept during the said period in the said factory by the claimant's bookkeepers for him, and to contain the original daily entries of orders from the claimant's customers for the different kinds of tobacco and snuff manufactured and sold, or sold by the claimant, and other memoranda, showing the fillings and shipment of the goods as ordered of the claimant, marked by the court as Exhibits , and proven to have been kept during said period; also certain books of account kept by C. W. Dennerker, as foreman of the claimant, and having charge of the shipment of all goods so ordered as aforesaid, and called by him the "tax-books," in which he testified he was accustomed to enter, from day to day, the quantities of tobacco and snuff manufactured in said factory which were sold upon order and shipped to customers; and also certain quantities of manufactured tobacco taken from the lofts and other parts of said factory to a part thereof on the lower floor, known as the retail-counter, where the said quantities were thereafter sold from time to time at retail to customers. It
40 appeared that the substance of the entries in these books was transferred by the said Davis to the said books 138, 138 A, kept by him, and that they were the materials from which he made up his account of manufactured goods of the claimant, sold or removed, as it appeared in said book and in the returns for taxation in evidence.

It appeared in evidence, as to the said retail-counter, that on the first floor of the factory a wooden partition, not extending to the ceiling and but about six feet in height, divided the floor into two compartments, but with means of intercommunication, of which one was used as a packing-room and the other as a store or sales room, in which were placed cases and packages of the different kinds of tobacco manufactured by the claimant, for exhibition and sale; that in front of the said partition was a counter, which was called, as aforesaid, the retail-counter; and that back of such counter and against the partition were shelves, on which were placed the goods to be sold. Large quantities of the different kinds of tobacco manufactured by the claimant were sold at this counter, during said period, by retail, in small lots, to customers, and no record or memorandum whatever was kept of such sales, except an entry by the cashier of the cash received by him from each customer.

There was evidence tending to show that when supplies of goods to be sold at said retail-counter were needed, a requisition was made on the person in charge of the packing or other room for a quantity of any particular kind of goods, which was furnished and a memorandum of the kind and quantity was made on a slip of paper, and that such memoranda were thereafter transferred by said Dennerker to the "tax-books" aforesaid.

It further appeared in evidence that in each month of said period

there were entries of the said order-book of quantities of the kind
41 of tobacco manufactured by the claimants known as granulated tobacco or killickinick, which had been sold and shipped from said factory, and which quantities did not appear in the said tax-books in specific items corresponding in quantity. There also appeared in said tax-books quantities of granulated tobacco not corresponding to quantity with any specific items of sales and shipments on said order-books. The foreman, Dennerker, testified that it was the custom to send granulated tobacco in large masses to the retail-counter, and that any particular quantity of granulated tobacco found on the order-books as shipped, and not entered as a specific item of like quantity in his tax-books, was probably filled out of the stock at the retail-counter, and it was taken from some of said masses previously sent to said counter; and that it was his practice to enter the said masses in his tax-books when they were sent to said counter.

And thereupon, and before the presiding judge proceeded to charge the jury, the counsel for the claimant submitted to the court the following prayers for instructions to be given to the jury, viz:

The court is requested to charge the jury in behalf of the claimant:

I. That if the jury shall believe that the returns for taxation of the tobacco known as extra long smoking-tobacco, between August, 1866, and the date of seizure were made in good faith and with an honest belief on the part of Mr. Lilienthal and his agents concerned or employed in the preparation of said returns, that said tobacco was liable to the fifteen cents rate of duty, and to no other or higher rule, then, even though said tobacco was by law liable to the forty cents rate of duty, the jury cannot for that cause find a verdict for the Government under sec. 48.

II. That in order to forfeit the property proceeded against in this action, or any part thereof, the jury must be satisfied, either: 1st,
42 that at the time of the finding thereof the manufactured articles' or some of them, were held by the persons in whose possession they then were, with a purpose then existing of selling or removing the same in fraud of the internal-revenue laws, or with design then existing to avoid payment of the taxes imposed thereon; or, 2d, that the persons in whose possession the raw materials were found held them, at the very time of such finding, with intent to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax.

III. That fraudulent intent and fraudulent acts long prior to the time of the finding and seizure of the property in this action (if any such existed) cannot warrant a verdict of condemnation unless accompanied or supported by evidence of fraudulent intent or fraudulent acts at a period nearly coincident with the time of seizure, and that if the jury believe that for the ten months next prior to the seizure the claimant properly made returns and paid taxes upon his manufactures, they may fairly infer therefrom a discontinuance of any fraudulent intent which he might have had previously.

IV. That even if the jury find that a fraudulent intent existed in the mind of Lilienthal at the time of making the return of the Kearney & Waterman tobacco, so called, in March, 1865, that fact of itself would not justify them in finding the existence of a fraudulent intent on his part in respect to the property proceeded against at the time that property was found or seized.

V. That if the jury should find that a fraudulent act was committed

by Lilienthal in 1865 in respect to property then in his possession, this alone, unless supported by other evidence, is not sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property found in his possession in 1868, and will not justify a verdict of condemnation.

43 VI. That the act of July 13, 1866, did not require manufacturers of tobacco to make returns to the assessor of the quantity of tobacco manufactured by them.

VII. That if the jury shall find as a fact that Mr. Lilienthal made returns of goods manufactured by him from month to month in no other way than by reporting the amount of such goods sold or removed within the same periods, respectively, that fact is no evidence to support a verdict of condemnation, unless the jury shall believe that that mode of making returns was adopted or used with fraudulent intent on the part of Mr. Lilienthal, or of the persons employed in making such returns.

VIII. That if the jury find that Mr. Lilienthal failed to make return of all the goods sold which he had purchased of other manufacturers, such failure is no evidence to support a verdict of condemnation, unless it was with a fraudulent intent on the part of Lilienthal, or of those persons employed in making such returns.

IX. That if the jury shall find that in 1865 Mr. Lilienthal returned for taxation and paid a tax of twenty-five cents per lb. upon 3,400 lbs. and 3,600 lbs. of tobacco shipped in 1867 to W. T. Coleman, in California, then he became liable to no additional tax by reason of said shipment of said tobacco at that time.

X. That if the jury shall find that at the time of the shipment of the 3,400 lbs. and 3,600 lbs. of tobacco in 1867 to W. T. Coleman, in California, the claimant believed that all the tax due thereon to the Government had already been paid, then his failure to return said tobacco for taxation upon said shipment is no evidence of fraudulent intent on the part of the claimant.

XI. That in the words "in fraud of the internal-revenue laws,"

44 as used in the 48th section of the act of June 30, 1864, are simply equivalent to the words "in fraud of the internal revenue."

XII. That acts in violation of the internal-revenue laws are not acts in fraud of the internal-revenue laws within the meaning of § 48, unless such acts are accompanied by an intent to defraud the United States.

XIII. That there is no evidence in this action that at the time of the finding or seizure of the property in this action, the claimant had not paid all the taxes due on all the goods, wares, merchandise, articles, or objects which had been before that date manufactured at his factory and sold or removed therefrom.

XIV. That there is no evidence in this action that any goods, wares, merchandise, articles, or objects on which taxes were imposed by the provisions of law, manufactured at the factory of Mr. Lilienthal, were ever sold or removed by him, or by any other person, in fraud of the internal-revenue laws, or with design to avoid payment of said taxes.

And the district attorney, on behalf of the United States, submitted the following prayers for instructions to be given to the jury, viz:

I. If the jury find that the books, Exhibits Nos. 138 and 138 A, were kept by Mr. Lilienthal, or his agents, as and for the account in book form required to be kept by the provisions of the ninetieth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, and that the said Lilienthal and his agents have therein kept no account of the quantity of tobacco or snuff manufactured by

said A. H. Lilienthal, at his factory, in Washington street, from August 1, 1866, to January 1, 1868; that quantities of tobacco and snuff
45 were removed for sale and removed from the said place of manufacture during the said period, and that no account of the tobacco and snuff so removed was kept as of removals thereof, and no accurate account of the tobacco so removed was kept in any manner in said books; that large quantities of granulated tobacco and other descriptions of tobacco manufactured were sold by Mr. Lilienthal during said period, and that no account of such sales, as sales, was kept in those books; that quantities of purchased manufactured tobacco were sold and removed from the said premises during the period from August 1, 1866, to December 1, 1867, and that no accurate account of such sales or removals was kept in such books; that exhibits numbered 1 to 17, both inclusive, were furnished to the assistant assessor of the district by said C. H. Lilienthal or his agents, as true and accurate abstracts of all such sales and removals, and were not true and accurate abstracts thereof; that the annual inventories, Exhibits 18 and 19, were made out and delivered by said C. H. Lilienthal to the assistant assessor of the district, severally, as true statements and inventories of the matters and things therein contained, as required by the said 90th section, as amended as aforesaid; that it appears from said inventory and abstracts that much more chewing-tobacco and fine shorts was manufactured in said manufactory during the year 1867 than was declared upon said abstracts to have been manufactured; that a large quantity of smoking-tobacco, manufactured on said premises, had been sold or removed during the year 1867, which had not been returned for taxation upon the said abstracts, and of which no account was contained therein, or in the said books, Exhibits Nos. 138 and 148 A; then, the burden of proof is upon the claimant to satisfy the jury that the tobacco so manufactured on said premises, and sold or removed, without due account, return, and entry made thereof in the said books and abstracts, in the manner required by law,
was not so sold and removed in fraud of the internal-revenue laws,
46 and with intent to evade the taxes thereon; and if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent, and that his possession of the goods in the suit was with the like intent.

II. If the jury find that, prior to August 1, 1866, when the act of July 13, 1866, went into effect, changing, in some respects, the rate of taxation on manufactured smoking-tobacco, a brand of smoking-tobacco known as "extra long smoking-tobacco" had been manufactured by C. H. Lilienthal, by cutting together stripped or stemmed leaf and stems, in certain proportions, and had been sold and returned for taxation by him as "smoking-tobacco," subject to a tax of thirty-five cents per pound under the existing law; that from the time said act of July 13, 1866, went into effect the said "extra long smoking-tobacco," manufactured as aforesaid, was entered by said Lilienthal in the account required to be kept in book form by the ninetieth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, of sales and removals of manufactured tobacco, as "chewing-tobacco," and was returned upon the abstracts of said accounts, required to be furnished monthly to the assistant assessor of the district by said section, as "chewing-tobacco," subject to a tax of forty cents per pound under the provisions of said act of July 13, 1866; that after the said 1st day of August, 1866, said C. H. Lilienthal varied the process of manufacturing said "extra long smoking-tobacco" by merely increas-

ing the proportion of stem, and from the 21st day of August, 1866, in each monthly return during the years 1866 and 1867, returned for taxation sales and removals of large quantities of the "extra long smoking-tobacco," so manufactured as "smoking-tobacco," subject to a tax of fifteen cents per pound under the provisions of said act of July 13, 1866; that the said "extra long smoking-tobacco," returned as
47 "chewing-tobacco" for taxation at the rate of forty cents per pound, was sold at seventy cents per pound, and the said "extra long smoking-tobacco," returned as "smoking-tobacco" for taxation at the rate of fifteen cents per pound, was sold at the rate of sixty cents per pound; that no officer of internal revenue was advised by C. H. Lilienthal, or his agents, of the said practice of returning the said "extra long smoking-tobacco" for taxation at fifteen cents per pound; that the Commissioner of Internal Revenue had published his instructions and opinion that tobacco so manufactured was subject, under the said act of 1866, to the tax of forty cents per pound as "smoking-tobacco," and never, directly or indirectly, countenanced or sanctioned the practice of said C. H. Lilienthal in returning the said "extra long smoking-tobacco;" and if the jury believe from these facts that said Lilienthal and his agents made the said change in the process of manufacturing the said "extra long smoking-tobacco" and the said change in the manner of returning the same for taxation, during said period from August 1, 1866, to January 1, 1868, for the purpose of selling and removing the same in fraud of the internal-revenue laws and with intent to evade the payment of taxes thereon, then they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit.

And thereupon the presiding judge, after some preliminary remarks, proceeded to charge the jury as follows:

The issue in this case is a very plain one. The prosecution is founded on the 48th section of the act of June 30, 1864, as amended by the 9th section of the act of July 13, 1866, (14 U. S. Stat. at Large, 111,) a section enacted at a comparatively early day in the history of the internal-revenue acts of this country, and which has remained on the statute-book, with some modifications, ever since, and has been enforced in a great many cases. Its provisions are these: that where any property subject to
48 a tax under a law of the United States is found in the possession of any person, with intent to sell it, or remove it, or dispose of it, without paying the tax upon it, or without having the tax paid upon it, or with intent to defraud the internal-revenue laws of the United States, such property so found under such circumstances in the possession of any person, with such intent, shall be forfeited to the United States, and may be seized, as this property was in this case, and be proceeded against in the manner in which this property is being proceeded against in this suit. The same section provides that if any raw materials are found in the possession of any person, he having the intent in respect to them, when they are so found in his possession, of manufacturing them into articles subject to tax, in respect to which articles he intends that the tax shall not be paid, or that the revenue shall be defrauded, such raw materials shall be forfeited to the United States. The same section goes on to provide that, under such circumstances, not only shall the articles subject to tax and the raw materials be forfeited, but all personal property, of any kind whatsoever, found on the same premises where such offending articles, so to speak, are found, shall be forfeited. There has been seized, in this case, not only tobacco in a manufactured state, subject to tax, but also a large quantity of raw materials—raw

tobacco, and other raw materials—and a large quantity of personal property connected with this establishment. The report of the appraiser values the entire property at $104,000. In that amount it was bonded and delivered to the claimant, and the Government accepted what it regarded as a satisfactory bond, in place of the property. It is this $104,000 worth of property, consisting generally of tobacco subject to tax, raw materials, and other personal property found in this establishment, that is the subject of this suit.

It is for the Government to satisfy you that this property was in this establishment with the intent mentioned, in respect to it, on the part of those in whose custody and control it was. For the purpose of making the matter clearly definite, I will read the language of the statute:

"All goods, wares, merchandise, articles, or objects on which taxes are imposed by the provisions of law, which shall be found in the possession or custody or within the control of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal-revenue law, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and the same shall be forfeited to the United States; and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to avoid the payment of said tax, and also all tools, implements, instruments, and personal property whatsoever in the place or building, or within any yard or enclosure, where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector, and the same shall be forfeited as aforesaid."

The district attorney has stated to you, in his summing up, the various grounds upon which he claims the forfeiture of the property seized; that is, the various grounds upon which he maintains that he has proved the existence of this intent, in respect to the taxable tobacco and the raw materials and other property seized in the factory of Mr. Lilienthal. As you have seen, the testimony is entirely testimony in regard to what are alleged to have been previous acts of omissions and commissions on the part of Mr. Lilienthal and persons in his establishment, in respect to the conduct of their business at previous times, in relation to the internal-revenue laws of the United States. This is a class of evidence which, as has been expressly adjudicated in many cases by the Supreme Court of the United States, is perfectly competent and legitimate evidence from which to infer a fraudulent intent in respect to existing property. It has been held, in respect to the importation of goods at the custom-house, that a fraudulent intent in respect to a particular importation of goods may be legitimately inferred by a jury from a previous fraudulent intent and previous fraudulent acts, show' in respect to property previously imported through the custom-house. There is a large class of cases on that subject, and the doctrine has been recently applied to an action under the internal-revenue laws by the circuit judge of this circuit in a case in the northern district of New York in regard to distilled spirits. It is, therefore, a class of evidence that can be legitimately appealed to, and is appealed to, in all cases of this kind. Sometimes it is accompanied by other evidence, in respect to an existing intent, in regard to property seized. Sometimes property seized is

found concealed, and to support the idea that fraud was intended in regard to it, previous fraudulent acts are given in evidence. Sometimes, as in this case, the evidence consists almost entirely of testimony in regard to previous acts, and to what is claimed by the district attorney to have been the fraudulent intent existing in such previous acts.

I shall call your attention particularly to the various matters that are relied on by the district attorney. The first one in regard to what is called "extra long smoking-tobacco," a species of tobacco in regard to which it may be generally stated that it has in it a very large proportion of stems. It is a kind of tobacco which, according to the evidence, was manufactured in this establishment, as a part of its ordinary business, prior to the 1st of August, 1866, at which date commenced this series of returns, seventeen in number, which are the main subjects of consideration in this case. It is a species of tobacco that was manufactured previous to that time, and returned month by month in
51 the monthly returns. That date is taken in this case because it is the date when the act of July 13, 1866, changing the rate of duty on various descriptions of tobacco, went into operation. Previous to that time the act imposing a tax on tobacco was the act of March 3, 1865, (13 U. S. Stat. at Large, 469.) That act of March 3, 1865, divided smoking-tobacco into two classes for taxation. One class, made exclusively of stems, was taxed fifteen cents a pound; and smoking-tobacco of all kinds, not included and provided for under the fifteen cents clause, was taxed thirty-five cents a pound. It appears from the evidence that the "extra long smoking-tobacco," so made in this establishment prior to August 1, 1866, and so being made in it when the act of July 13, 1866, was passed, had been, up to the first of August, 1866, returned by Mr. Lilienthal as "smoking-tobacco," under this thirty-five cents clause, and not under the fifteen cents clause. Not being made exclusively of stems it was not liable to the fifteen cents tax, and, therefore, it was liable to the thirty-five cents tax. It also appears that, for some twenty days or so after the 1st of August, 1866, when this new law, July, 1866, went into effect, this "extra long smoking-tobacco," which had, before August 1, 1866, been returned at thirty-five cents, was returned by Mr. Lilienthal as liable to a tax of forty cents, under a clause in the act which so went into effect August 1, 1866, and was returned by him under the head of "chewing-tobacco." The reason stated by the claimant for returning such tobacco as "chewing-tobacco" is, that there was no place to insert it in the form of return, except under the head of "chewing-tobacco." It had, however, been previously returned as "smoking-tobacco," and it was called "smoking-tobacco" in the price-list issued by the claimant. After it had been returned for some twenty days after the 1st of August, 1866, as liable to a tax of forty cents a pound, it was at all times thereafter returned by the claimant as liable to a tax of fifteen cents a pound, it was continued at that rate throughout all the returns, down to the 31st of December, 1867, and all the
52 smoking-tobacco of every kind that was returned by the claimant in all the returns made by him during all the seventeen months was returned at fifteen cents a pound, and no smoking-tobacco was returned at forty cents a pound. There was no class of thirty-five cents smoking-tobacco in the act of July, 1866. The only classes of smoking-tobacco in that act were these two—smoking-tobacco, sweetened, stemmed, or butted, forty cents per pound; and all smoking-tobacco not sweetened, nor stemmed, nor butted, including that made of stems or in part of stems, and imitations thereof, 15 cents per pound. A great deal was said in this case on the argument to the court as to

the proper construction of the act of July, 1866, in regard to the tax on this "extra long smoking-tobacco." You will recollect that, during the greater part of the seventeen months after the 1st of August, 1866, all except a very small portion of the time, at the commencement, this "extra long smoking tobacco" was prepared by putting into it rather more stems, say ten pounds more in every ninety pounds of product, than they had been in the habit of putting in before the 1st of August, 1866. It always had had a large proportion—not a preponderance—of stems in it, although it was not made exclusively of stems. I do not consider it necessary in this case to determine what is the proper interpretation of this fifteen cents clause in the act of July, 1866, or under what head in that act as a matter of law this "extra long smoking-tobacco," manufactured in the manner described by Mr. Dennerker, properly falls. The facts, to recapitulate them, about which there is no dispute, in regard to this "extra long smoking-tobacco" are, that, at the time this act of July 13, 1866, went into effect, Mr. Lilienthal was manufacturing this "extra long smoking tobacco;" that, previous to that time, he had returned it at thirty-five cents a pound, as "smoking-tobacco," under the act of March 3, 1865; that after the act of July, 1866, went into effect, and until about the 20th or 21st of August, 1866,
53 he returned it at forty cents a pound; and that, after that time, the mass, if not all of it, during the entire residue of the seventeen months was returned at fifteen cents a pound, there being no difference whatever in the tobacco during all the periods when it was so returned at the several rates of thirty-five, forty, and fifteen cents, except that during almost all of the seventeen months, commencing with August, 1866, it contained in every ninety or one hundred pounds ten pounds more of stems than it had before August, 1866, been in the habit of containing. The quantity of it in the returns for such seventeen months was quite large. The district attorney claims that the average was about five thousand pounds a month; and, at all events, the quantity was considerable.

The district attorney has addressed to you an argument for the purpose of showing that, no matter what the interpretation of the act of July, 1866, may properly be, the conduct of Mr. Lilienthal in regard to this "extra long smoking-tobacco" shows an intent on his part throughout to defraud the Government in regard to the tax upon such tobacco. It is for you to say whether you believe that he has established the proposition for which he contends. The theory on the part of the defence is, that because this tobacco had some stems in it, it was liable to a tax of fifteen cents a pound; that, at all events, Mr. Lilienthal, reading the law for himself, had a right to think that it was capable of a double interpretation, and that there could be no fraudulent design or intent on his part until his attention was in some way called to the subject, or until the matter had been judicially determined. The district attorney on his part contends that if to put any stems whatever into the tobacco reduces it to a fifteen-cent tax, it makes no difference how much stems there are in it, more or less; and that, therefore, the testimony in regard to putting more stems into this tobacco has no bearing upon any honest transactions in regard to this matter. In other words, he claims that
54 if the ground taken by Mr. Lilienthal at the time, that this tobacco was liable to the fifteen cents tax because it had some stems in it, was correct, and that all tobacco, under the act of July, 1866, which had any stems in it, or was made in part of stems, was liable to fifteen cents a pound tax and not forty cents, then it was absurd to put in any more stems, because the quantity of stems that was in already was en-

found concealed, and to support the idea that fraud was intended in regard to it, previous fraudulent acts are given in evidence. Sometimes, as in this case, the evidence consists almost entirely of testimony in regard to previous acts, and to what is claimed by the district attorney to have been the fraudulent intent existing in such previous acts.

I shall call your attention particularly to the various matters that are relied on by the district attorney. The first one in regard to what is called "extra long smoking-tobacco," a species of tobacco in regard to which it may be generally stated that it has in it a very large proportion of stems. It is a kind of tobacco which, according to the evidence, was manufactured in this establishment, as a part of its ordinary business, prior to the 1st of August, 1866, at which date commenced this series of returns, seventeen in number, which are the main subjects of consideration in this case. It is a species of tobacco that was manufactured previous to that time, and returned month by month in
51 the monthly returns. That date is taken in this case because it is the date when the act of July 13, 1866, changing the rate of duty on various descriptions of tobacco, went into operation. Previous to that time the act imposing a tax on tobacco was the act of March 3, 1865, (13 U. S. Stat. at Large, 469.) That act of March 3, 1865, divided smoking-tobacco into two classes for taxation. One class, made exclusively of stems, was taxed fifteen cents a pound; and smoking-tobacco of all kinds, not included and provided for under the fifteen cents clause, was taxed thirty-five cents a pound. It appears from the evidence that the "extra long smoking-tobacco," so made in this establishment prior to August 1, 1866, and so being made in it when the act of July 13, 1866, was passed, had been, up to the first of August, 1866, returned by Mr. Lilienthal as "smoking-tobacco," under this thirty-five cents clause, and not under the fifteen cents clause. Not being made exclusively of stems it was not liable to the fifteen cents tax, and, therefore, it was liable to the thirty-five cents tax. It also appears that, for some twenty days or so after the 1st of August, 1866, when this new law, July, 1866, went into effect, this "extra long smoking-tobacco," which had, before August 1, 1866, been returned at thirty-five cents, was returned by Mr. Lilienthal as liable to a tax of forty cents, under a clause in the act which so went into effect August 1, 1866, and was returned by him under the head of "chewing-tobacco." The reason stated by the claimant for returning such tobacco as "chewing-tobacco" is, that there was no place to insert it in the form of return, except under the head of "chewing-tobacco." It had, however, been previously returned as "smoking-tobacco," and it was called "smoking-tobacco" in the price-list issued by the claimant. After it had been returned for some twenty days after the 1st of August, 1866, as liable to a tax of forty cents a pound, it was at all times thereafter returned by the claimant as liable to a tax of fifteen cents a pound, it was continued at that rate throughout all the returns, down to the 31st of December, 1867, and all the
52 smoking-tobacco of every kind that was returned by the claimant in all the returns made by him during all the seventeen months was returned at fifteen cents a pound, and no smoking-tobacco was returned at forty cents a pound. There was no class of thirty-five cents smoking-tobacco in the act of July, 1866. The only classes of smoking-tobacco in that act were these two—smoking-tobacco, sweetened, stemmed, or butted, forty cents per pound; and all smoking-tobacco not sweetened, nor stemmed, nor butted, including that made of stems or in part of stems, and imitations thereof, 15 cents per pound. A great deal was said in this case on the argument to the court as to

the proper construction of the act of July, 1866, in regard to the tax on this "extra long smoking-tobacco." You will recollect that, during the greater part of the seventeen months after the 1st of August, 1866, all except a very small portion of the time, at the commencement, this "extra long smoking tobacco" was prepared by putting into it rather more stems, say ten pounds more in every ninety pounds of product, than they had been in the habit of putting in before the 1st of August, 1866. It always had had a large proportion—not a preponderance—of stems in it, although it was not made exclusively of stems. I do not consider it necessary in this case to determine what is the proper interpretation of this fifteen cents clause in the act of July, 1866, or under what head in that act as a matter of law this "extra long smoking-tobacco," manufactured in the manner described by Mr. Dennerker, properly falls. The facts, to recapitulate them, about which there is no dispute, in regard to this "extra long smoking-tobacco" are, that, at the time this act of July 13, 1866, went into effect, Mr. Lilienthal was manufacturing this "extra long smoking tobacco;" that, previous to that time, he had returned it at thirty-five cents a pound, as "smoking-tobacco," under the act of March 3, 1865; that after the act of July, 1866, went into effect, and until about the 20th or 21st of August, 1866,
53 he returned it at forty cents a pound; and that, after that time, the mass, if not all of it, during the entire residue of the seventeen months was returned at fifteen cents a pound, there being no difference whatever in the tobacco during all the periods when it was so returned at the several rates of thirty-five, forty, and fifteen cents, except that during almost all of the seventeen months, commencing with August, 1866, it contained in every ninety or one hundred pounds ten pounds more of stems than it had before August, 1866, been in the habit of containing. The quantity of it in the returns for such seventeen months was quite large. The district attorney claims that the average was about five thousand pounds a month; and, at all events, the quantity was considerable.

The district attorney has addressed to you an argument for the purpose of showing that, no matter what the interpretation of the act of July, 1866, may properly be, the conduct of Mr. Lilienthal in regard to this "extra long smoking-tobacco" shows an intent on his part throughout to defraud the Government in regard to the tax upon such tobacco. It is for you to say whether you believe that he has established the proposition for which he contends. The theory on the part of the defence is, that because this tobacco had some stems in it, it was liable to a tax of fifteen cents a pound; that, at all events, Mr. Lilienthal, reading the law for himself, had a right to think that it was capable of a double interpretation, and that there could be no fraudulent design or intent on his part until his attention was in some way called to the subject, or until the matter had been judicially determined. The district attorney on his part contends that if to put any stems whatever into the tobacco reduces it to a fifteen-cent tax, it makes no difference how much stems there are in it, more or less; and that, therefore, the testimony in regard to putting more stems into this tobacco has no bearing upon any honest transactions in regard to this matter. In other words, he claims that
54 if the ground taken by Mr. Lilienthal at the time, that this tobacco was liable to the fifteen cents tax because it had some stems in it, was correct, and that all tobacco, under the act of July, 1866, which had any stems in it, or was made in part of stems, was liable to fifteen cents a pound tax and not forty cents, then it was absurd to put in any more stems, because the quantity of stems that was in already was en-

tirely sufficient to bring the tobacco within the fifteen cents tax. It is for you to say what force and weight you will give to this argument. In that connection the district attorney calls attention to the fact that, all through the seventeen months, all the smoking-tobacco that was returned by Mr. Lilienthal was returned at the fifteen-cents rate, and none was returned at forty cents a pound. He also claims that the books of Mr. Lilienthal show that Mr. Lilienthal had a purpose to benefit himself, and not to deal honestly with the Government, in this: that what was returned by him at forty cents a pound, during the short time he returned it at that rate, after the act of July, 1866, went into operation, appears by the books to have been sold at seventy cents a pound; and when he returned the tobacco at fifteen cents a pound, thus reducing the tax by twenty-five cents a pound, he reduced his price to the purchaser by only ten cents a pound for the same tobacco, with the same increased quantity of stems in it, thus making to himself a clear difference in his own favor, as is claimed, of fifteen cents a pound out of the twenty-five cents a pound reduction in the tax. That is claimed by the district attorney to be a circumstance to be taken into consideration. It is also claimed by the district attorney that there is no evidence to show that the Government had any information until February, 1867, as to how this "extra long smoking-tobacco" was made; that at that time, when such information was communicated to Mr. Van Wyck, the collector, as is shown by his letter of March, 1867, to the Internal-
55 Revenue Office, he supposed the state of facts to exist which is disclosed in that letter, namely, that the identical stems which were taken out of the tobacco for the purpose of being subjected to this treatment, which would assimilate them to leaf-tobacco in appearance, and, perhaps, in flavor, were put back with the leaves from which they were taken; that the Internal-Revenue Office, when, in August, 1867, it replied to the letter of Mr. Van Wyck, acted upon that idea, and in this way: that, while the act of July 13, 1866, said that smoking-tobacco stemmed should pay a tax of forty cents a pound, the Commissioner of Internal Revenue stretched a point in favor of the tobacco manufacturers by saying to them: "Although you take away physically the stems from the leaves in the course of your manufacture, so that in one sense the tobacco is stemmed, nevertheless, for the purpose of giving you the privilege of putting those stems through this manipulation, we will consider that the tobacco is not stemmed, provided you put back those identical stems with the leaves to which they belong." The district attorney also contends that, inasmuch as the claimant returned this tobacco, under the act of 1865, at the rate of thirty-five cents, and then returned it for a little while, under the act of 1866, at forty cents, and then changed the rate to fifteen cents, he has not shown honesty and good faith, because it does not appear that he laid all the facts before the Internal-Revenue Department, and asked what the tax on the tobacco should be, but put it down, month after month, at fifteen cents a pound, without raising the question whether the rate ought not, perhaps, to be forty cents. These I understand to be substantially the views urged on the part of the Government in regard to that question. You will perceive that those views are, as I said before, entirely irrespective of any determination, as a matter of law, as to what in fact the tax on that tobacco was; and it is for you to say what inference you will draw from all this testimony in regard to the intent Mr. Lili-
56 enthal had in respect to this "extra long smoking-tobacco." The question applies to the entire series of months from August, 1866, to December, 1867. The seizure took place in March, 1868; and it ap-

pears from the inventory of the property seized that there was among it a considerable quantity of "extra long smoking-tobacco," some of it loose and some of it in papers. These are all the remarks which it seems necessary to make to you in regard to this "extra long smoking-tobacco."

The next subject is the Orinoco tobacco which was sent to California in April and May, 1867—on the 13th of April, 3,600 pounds, and on the 29th of May, 3,400 pounds. It is admitted that this tobacco was not returned for tax at that time—April and May, 1867. There is no dispute that it was sent out of the establishment at that time; that it was removed for sale at that time; that it was sent to California to be sold at that time; and that it was not put into any return at that time. If it had been put into a return at that time, there is no dispute that it would have come under the fifteen cents tax under the act of 1866, because it was tobacco which had not been in any manner stemmed. It was leaf and stem together, just as it grew, pressed into a mass, into a cake. Not having been stemmed, it was not subject to a duty of forty cents a pound, and it fell directly under the fifteen cents clause, as smoking-tobacco not stemmed. The history of that tobacco, as developed, is this: It was returned for tax as a portion of a larger mass of the same description of tobacco, Orinoco tobacco, on the 31st of March, 1865, the day before the 1st of April, 1865, and the day before the act of March 3, 1865, went into effect. That act of March 3, 1865, imposed a higher tax upon that description of tobacco than it had been previously subject to under the act of June 30, 1864. Under the act of June 30, 1864, that tobacco was liable for a tax of twenty-five cents a pound. The provision of that act was: "Smoking-tobacco, manufactured with all the stem in, the leaf not having been butted or stripped from the stem, twenty-five cents per pound." Under the act of March 3, 1865, which was to go into effect on the first of April, 1865, this tobacco, which, up to the close of the 31st March, 1865, was liable to a tax of twenty-five cents a pound, would have been liable to a tax of thirty-five cents a pound, being an increase of ten cents a pound. Mr. Lilienthal at that time went through the process that was developed on the trial, and stated by himself in his testimony, of entering upon his sales-book a sale, or a transaction as a sale, of the mass of Orinoco tobacco, of which this 7,000 pounds, which were afterwards sent to California, in April and May, 1867, formed a part, and of a large quantity of other tobacco, in all some $60,000 worth, to a house in this city, Kearney & Waterman. Kearney & Waterman gave him their check for that amount, and, two or three days afterwards, he gave to Kearney & Waterman his check for the same amount. The tobacco was not removed from his establishment, and never passed into the possession of Kearney & Waterman. Mr. Lilienthal kept it on his own premises, and, after he brought it back (as the expression is) he treated it as his own, and disposed of it as such. In connection with such alleged sale in that way to Kearney & Waterman, on the 31st of March, 1865, Mr. Lilienthal put that Orinoco tobacco into the tax, at that date, at the rate of twenty-five cents a pound, and returned it as sold. He told you frankly on the stand, that he went through this operation because, under the law of 1865, there was going to be a higher duty on such tobacco. He kept the tobacco on hand so long that there came another change in the law, and, by the time he sent it to California, if he had not paid any tax on it before, he would have had to pay on it a tax of only fifteen cents a pound. It is my duty to say to you that that transaction was utterly illegal. The 94th section of the act of June 30, 1864, under which

57

58 Mr. Lilienthal was acting at the time he returned this tobacco for tax, on the 31st of March, 1865, before the act of March 3d, 1865, went into effect, provided as follows, "Upon the articles, goods, wares, and merchandise hereinafter mentioned, except where otherwise provided," which includes this tobacco taxable at twenty-five cents a pound, "which shall be produced and sold, or be manufactured or made and sold, or be consumed or used by the manufacturer or producer thereof, or removed for consumption or for delivery to others than agents of the manufacturer or producer, within the United States or territories thereof, there shall be levied, collected, and paid the following duties, to be paid by the producer or manufacturer thereof." It is perfectly clear that that transaction was no real sale of the property. It was not intended to be a sale. It was, as it has been well characterized here, a perfect sham, from beginning to end. Now, it was illegal to return the Orinoco tobacco for tax, because it was not sold, nor was it removed for consumption. The words "removed for consumption," in the act of 1864, are defined by the provisions of the 91st section of the same act. The property must be removed from the premises of the manufacturer in good faith, with a then present intention to have it consumed, as against the will of the manufacturer and owner of it, giving a right to another person to put it into consumption, or the property in it must in some way be changed, or it must be sent for sale on commission, or, in some way or other, an intention to put into the category prescribed by the act must be manifested in regard to it. But this property, you will remember, remained on the premises of Mr. Lilienthal, not disturbed in any manner, and was returned for tax under the circumstances stated.

59 It is claimed, on the part of the defence, that, inasmuch as the tax of twenty-five cents a pound had once been paid upon this Orinoco tobacco, there was no obligation on the part of Mr. Lilienthal to make a subsequent return of it, and to pay another tax on it; and that this was the case, a fortiori, if, as was the fact, at the time the tobacco was sent to California, the tax on it would have been fifteen cents a pound. In this connection, reference was made to the following provision in the 7th section of the act of July 13, 1866, which went into effect on the 1st of August, 1866, and was in force when this Orinoco tobacco was sent to California, in April and May, 1867: "All manufactures and productions on which a duty was imposed by either of the acts repealed by this act," which embraces the provisions imposing duties on tobacco contained in the previous act of June, 1864, which was the act in force when this tobacco was returned for tax on the 31st of March, 1865, "which shall be in the possession of the manufacturer or producer, or of his agent or agents, on the day this act takes effect, the duty imposed by any such former act not having been paid, shall be held and deemed to have been manufactured or produced after such date." The defence contends that the duty on this tobacco had been paid, within this provision. But that is not the law. The law says all manufactures "on which a duty was imposed," "the duty imposed" by the act of 1864 not having been paid. Now, no duty was imposed upon this Orinoco tobacco. A duty was imposed upon it only when it was sold in good faith or removed for consumption. There was no duty imposed upon it at the time it was returned for tax at twenty-five cents a pound. The claimant had no right to return it at twenty-five cents, particularly when it is acknowledged by himself, on the stand, that he did so for the purpose of getting rid of the coming thirty-five cents duty, and when, therefore, it is clear that there was an intent to commit a

fraud on the Government. The act of 1866 only applies to the
60 payment of a duty which has been imposed. Otherwise, a party would be able to take advantage of his own wrong, by paying a tax of twenty five cents a pound for the purpose of getting rid of a tax of thirty-five cents that was going into effect the next day, and paying the tax when the law gave him no right to pay it, and afterwards to say that, because he had paid it, there was no intent to defraud the Government, and that thus the fraud so committed was condoned. The law is not so. The law merely says, that if a tax which has been imposed has been paid, no tax can be collected again on the same article. You are to consider the question not solely in the light of the fact that the law happened to be altered again, and the duty to be reduced from thirty-five cents to fifteen cents a pound, before the tobacco was sent to California, but, also, in the light of what Mr. Lilienthal did, and what his intent was, in regard to the tobacco, as bearing upon his intent in regard to the tobacco found in his possession when his establishment was seized.

The district attorney has called your attention, very properly, to the fact that the law, in all its provisions, aims at this: that manufacturers of tobacco shall not be allowed to aggregate in their establishments large quantities of tax-paid goods. An account is to be kept of goods sold, as they are sold and removed. They are to be removed from the premises—removed for consumption. They are not to be returned in masses, at the pleasure of the manufacturer, at a given time, without being disturbed in any manner or removed from his establishment, so that he may be enabled to have on hand a large mass of goods, from which he can say, at any time, that any particular goods sold which cannot be traced were taken. These considerations, addressed to you, are considerations of force, and are to be taken into view by you in judging of the intent with which a manufacturer aggregates upon
61 his premises, without removing therefrom a large quantity of tax-paid goods, such a practice being against all the provisions of the law, and directly unlawful in respect to this Orinoco tobacco, so returned for tax on the 31st of March, 1865.

The next subject in regard to which the district attorney claims that a fraudulent intent is shown on the part of Mr. Lilienthal, is in respect to the account which, by the 90th section of the act of 1864, as amended by the 9th section of the act of 1866, is required to be kept by every tobacco-manufacturer. We have had exhibited here all the books on the subject kept in this establishment. They appear not to be blank forms printed, but to be entirely in writing. This one is headed, "Account of tobacco and snuff sold by C. H. Lilienthal in the year 1867." The heading is all in writing. This one that preceded it appears to have a heading in print. But, in regard to both of them, it may be said that they embrace nothing but goods sold. They in no manner embrace, or pretend to embrace, goods manufactured. The earlier book is headed, "Quantity of tobacco and snuff sold and consumed, and removed for sale or consumption, from the factory;" and the latter book is headed, "Account of tobacco and snuff sold." In regard to this matter the law is explicit. It requires every manufacturer of tobacco, snuff, or cigars to "keep in book form an accurate account of all the articles aforesaid thereafter purchased by him, the quantity of tobacco, snuff, snuff-flour, or cigars, of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from the place of manufacture." It is perfectly clear that, in this case, no such book was kept by Mr. Lilienthal, and no book showing in any manner the manufactured goods, but showing only those that were sold. "Manufactured"

goods means goods the manufacture of which is completed, so that the goods are in a condition to be sold, and so that all that needs to be done, if a purchaser asks for them, is to deliver them. No account of such goods was kept. When the manufacturer comes to make up his abstract, and hand it in to the assessor, he is not required to hand in an abstract of goods manufactured. He is required to hand in only an abstract of goods purchased, sold, or removed. But Mr. Lilienthal, as you perceive, had, in the abstracts returned by him, a column for goods manufactured, as well as one for goods sold and removed for sale. He had no book, however, from which he could obtain any entries to put into the column of goods manufactured, because no such book was kept, and, therefore, that happened which you naturally expect would happen. He filled up the column of goods sold, in the the abstract furnished to the Government, from the book kept by him, of goods sold; and when he came to fill up the column of goods manufactured, having no record of them, he put down, in every case, as manufactured, the same quantity which he put down as sold.

62

It was a clear violation of law not to keep an account of goods manufactured. The reason why the law requires this book of goods manufactured to be kept, although it does not require the abstract returned by the tenth day of each month to set forth the goods manufactured, is, that the manufacturer is required to furnish a statement or inventory every January, setting forth all the property he has on hand in his business, and what portion of the goods was manufactured or produced by him, and what portion was purchased from others. Therefore, unless a record be kept of goods manufactured, it is impossible for the manufacturer to comply with the law, by handing in every January a true statement of all the goods on hand, specifying which of them were manufactured or produced by him, and which of them were purchased.

The district attorney has also called your attention to the inventories furnished by Mr. Lilienthal, for 1867 and 1868, and to what he claims are discrepancies between them and the monthly returns made to the Government. It is for you to say what inference you will draw therefrom with regard to any intent on the part of Mr. Lilienthal. The twelve returns for 1867, in respect to chewing-tobacco, correspond throughout, in the columns for manufacture and sale, so many pounds being manufactured, and the same number of pounds being sold, in the same month. As a matter of course, the quantity of manufactured chewing-tobacco set forth as on hand in the inventory of 1868, ought not to have been greater or less than the quantity of manufactured chewing-tobacco set forth as on hand in the inventory of 1867; and yet the district attorney states that the two inventories differ in that respect. So, in regard to fine-cut shorts, the two columns for manufacture and sale are alike in the twelve returns for the year 1867, and yet the two inventories do not correspond in respect to fine-cut shorts. So in regard to smoking tobacco, the district attorney claims there is a like discrepancy. He also claims that the Orinoco tobacco, if it were sold and bought back, ought to have been returned as purchased goods on hand on the 1st of January, 1867, whereas he claims it was not so returned. All these circumstances are commented upon by the district attorney, for the purpose of inferring from them an intent on the part of Mr. Lilienthal throughout, in the manner in which he kept his books, and in the manner in which he returned for tax, under the act of 1865, the tobacco which he had on hand when that act went into effect, and in the fact that he kept on hand a large quantity of tax-paid tobacco, contrary to the policy of the law, not to deal honestly with the Govern-

63

ment, but to violate the law, and thence of inferring a fraudulent intent in regard to the goods on hand in his establishment when it was seized.

The last subject to which attention was called by the district attorney was the result of the examination of the books of the claimant. It appears from them, in respect particularly to that which occu-
64 pied so much time in the investigation—the Orinoco tobacco, and the killickinick tobacco—that there are large quantities of granulated tobacco found in the order-books that are not found, in the same specific items, in the tax-books, and large quantities of granulated tobacco returned for tax in the tax-books which cannot be identified with any specific items in the order-books. A great many items were identified, and, in regard to those which could not be, you will recollect the testimony of Mr. Dennerker. When asked, "Where did the granulated tobacco come from which filled the orders in the order-books, which cannot be identified as items in the tax-books?" it was part, he said, of a large mass that had been entered for tax on a certain day, and taken down stairs into the retail-counter department. Under the law, that was a wholly illegal mode of doing business. Mr. Lilienthal had no right arbitrarily to take a quantity of killickinick tobacco and return it for tax, and remove it down stairs into his retail-counter department, or into any other part of his premises, and peddle it out by the pound from day to day for an indefinite period of time. When it was so entered for tax, as I stated before in regard to the Orinoco tobacco, it had not been sold, and it was not removed for consumption, within the law. Removing it from up stairs to down stairs was not a removal for consumption, within the meaning of the statute. In addition to that, it is admitted that, when tobacco so taken in masses, and returned for tax, and then taken down stairs to the retail counter, was sold at the retail counter afterwards, no record of those sales was kept, in any manner whatever. The 90th section of the act of 1864, as amended by the act of 1866, requires that a record shall be kept of all sales, and that an abstract of such sales shall be returned by the 10th day of each month. This property, when it was taken from up stairs to the retail counter room, was not sold by Mr. Lilienthal to anybody. It was not sold to himself. It was not removed from his premises for consumption.
65 It was taken from up stairs and brought down stairs, and, when it was sold over the counter, no record of it was kept, in utter violation of the statute, and no abstract of it was returned, in violation of the statute. Mr. Lilienthal arbitrarily took three hundred or four hundred pounds and returned it for tax to-day, and then carried it down stairs, and then kept no record whatever of its subsequent sale. So that the purpose of the law was defeated by this transaction, because the Government could have no means, when it got hold of Mr. Lilienthal's books, of tracing the sales of the tobacco. The fact that the Government has been foiled in tracing such sales has been demonstrated here, because, no record of the sales having been kept, whenever any order which was found in the order-book could not be identified with an item in the tax-book, specifically returned as so many pounds, Mr. Dennerker testified that the order was filled out of the masses of tobacco which so went down stairs to the retail counter. The business, therefore, was conducted in such a manner as to deprive the Government of what the law designed to provide, namely, a check over the transactions of tobacco manufacturers.

I have thus gone over the books of the claimant. It was necessary that I should show you what are violations of the law, in order that, if you should come to the conclusion, from the evidence, that such viola-

tions of law, in point of fact, took place, and that they showed an intent on the part of Mr. Lilienthal to defraud the revenue, you might have before you the law and the facts from which the district attorney claims that you have a right to infer a fraudulent intent on the part of Mr. Lilienthal, in respect to the tobacco on hand at the time of the seizure. I do not design to intimate any opinion whatever in regard to any intent on the part of Mr. Lilienthal in respect to these matters. But the facts in this case are undisputed. There is no serious contest about a single fact, except in regard to the very point of the law—the intent.

66 On the part of the claimant, it is claimed that the investigation before you has shown that, in point of fact, the Government has not proved that it has been deprived of any tax; and, also, that it has been shown affirmatively, by an examination of the books, that the Government has received all the taxes to which it was entitled, upon all goods which passed out of the establishment of Mr. Lilienthal prior to the seizure. You have heard all the evidence and the summing up on that subject, and it will be for you to say what is your belief on that subject, as bearing on the question of Mr. Lilienthal's intent in respect to the goods seized.

I shall now read to you instructions prayed by the claimant. The instructions of law are twelve in number, to all of which I assent. The thirteenth and fourteenth instructions, which are requests to charge as to the facts, I decline to charge, as not been questions of law.

The first proposition of the part of the claimant is this, and I assent to it: "If the jury shall believe that the returns for taxation of the tobacco, known as 'extra long smoking-tobacco,' between August, 1866, and the date of seizure, were made in good faith, and with an honest belief on the part of Mr. Lilienthal and his agents concerned or employed in the preparation of said returns that said tobacco was liable to the fifteen cents rate of duty, and to no other or higher rate, then, even though said tobacco was by law liable to the forty cents rate of duty, the jury cannot, for that cause, find a verdict for the Government, under section forty-eight."

The second proposition is this: "In order to forfeit the property proceeded against in this action, or any part thereof, the jury must be satisfied either, first, that at the time of the finding thereof," that is, on the 25th of March, 1868, "the manufactured articles, or some of them, were held by the persons in whose possession they then were, with a

67 purpose, then existing, of selling or removing the same in fraud of the internal-revenue laws, or with a design, then existing, to avoid payment of the taxes imposed thereon; or, second, that the person in whose possession the raw materials were found, held them, at the very time of such finding, with intent to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of such tax." That is correct.

The third proposition, to which I assent, is this: "Fraudulent intent and fraudulent acts, long prior to the time of the finding and seizure of the property in this action, (if any such existed,) cannot warrant a verdict of condemnation, unless accompanied or supported by evidence of fraudulent intent or fraudulent acts at a period nearly coincident with the time of seizure; and, if the jury believe, that for the ten months next prior to the seizure the claimant properly made returns and paid taxes upon his manufactures, they may fairly infer therefrom a discontinuance of any fraudulent intent which he might have had previously."

The fourth proposition I assent to: "Even if the jury find that a fraud-

ulent intent existed in the mind of Mr. Lilienthal at the time of making the return of the Kearney & Waterman tobacco, so called, in March, 1865, that fact of itself would not justify them in finding the existence of a fraudulent intention on his part in respect to the property proceeded against, at the time that property was found or seized."

The fifth proposition I assent to: "If the jury should find that a fraudulent act was committed by Mr. Lilienthal in 1865, in respect to property then in his possession, this alone, unless supported by other evidence, is not sufficient to warrent them in finding the existence of a fraudu-
68 lent intent on his part in regard to the property found in his possession in 1868, and will not justify a verdict of condemnation."

The sixth proposition I assent to: "The act of July 13, 1866, did not require manufacturers of tobacco to make return to the assessor of the quantity of tobacco manufactured by them."

The seventh proposition I assent to: "If the jury shall find, as a fact, that Mr. Lilienthal made returns of goods manufactured by him from month to month, in no other way than by reporting the amount of such goods sold or removed within the same periods respectively, that fact is no evidence to support a verdict of condemnation, unless the jury shall believe that that mode of making returns was adopted or used with fraudulent intent on the part of Mr. Lilienthal, or of the person employed in making such returns," The mere fact amounts to nothing unless you shall believe there was a fraudulent intent in connection with it.

The eighth proposition I assent to: If the jury find that Mr. Lilienthal failed to make return of all the goods sold which he had purchased of other manufacturers, such failure is no evidence to support a verdict of condemnation, unless it was with a fraudulent intent on the part of Mr. Lilienthal, or of the person employed in making such returns.

The ninth proposition is this: If the jury shall find that, in 1865,"—this is the Kearney and Waterman transaction again—"Mr. Lilienthal returned for taxation, and paid a tax of twenty-five cents per pound upon thirty-four hundred pounds and thirty-six hundred pounds of tobacco, shipped in 1867 to W. T. Coleman, in California, then he became liable to no additional tax by reason of said shipment of said tobacco at that time." There is no doubt about that. If the Government
69 should sue Mr. Lilienthal to-day for fifteen cents a pound tax on that tobacco, it would be a perfect defence for him to show that he had paid a tax of twenty-five cents a pound tax upon it.

The tenth proposition I assent to. "If the jury shall find that, at the time of the shipment of the thirty-four hundred pounds and thirty-six hundred pounds of tobacco, in 1867, to W. T. Coleman in California, the claimant believed that all the tax due thereon to the Government had already been paid, then his failure to return said tobacco for taxation upon said shipment is no evidence of fraudulent intent on the part of the claimant." This is a correct proposition. If you believe that Mr. Lilienthal, with his knowledge of that transaction in 1865, with the view of it held by him, which he testified to here, believed that the tax was due to the Government at the time he paid it, he could have had no fraudulent intent; and it is for you to say what his belief was in regard to its bearing upon the question of intent, but it must, as I have said before, have been a payment of a tax which Mr. Lilienthal honestly believed at the time he was bound to pay, and not a payment of tax merely because it was going to be raised the next day to thirty-five cents a pound.

The eleventh proposition I assent to: "The words, 'in fraud of the Internal Revenue laws,' as used in the forty-eighth section of the act of

June 30, 1864, are simply equivalent to the words, 'in fraud of the Internal revenue.'"

The twelfth proposition I assent to: "Acts in violation of the internal-revenue laws are not acts in fraud of the internal-revenue laws, within the meaning of section 48, unless such acts are accompanied by an intent to defraud the United States." This is an abstraction which I certainly should not care to dissent from.

70 The other two propositions are questions of fact, addressed to me, to charge you that there is no evidence of this or that, which I decline to charge.

The propositions on the part of the Government are substantially what I have already stated, but I will go over them, for the purpose of saying that I assent to them.

"First. If the jury find that the books, Exhibits Nos. 138 and 138A, were kept by Mr. Lilienthal, or his agents, as and for the account in book-form required to be kept by the provisions of ninetieth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, and that the said Lilienthal and his agents have therein kept no account of the quantity of tobacco or snuff manufactured by said C. A. Lilienthal, at his factory in Washington street, from August 1, 1866, to January 1, 1868; that quantities of tobacco and snuff were removed for sale and removed from the said place of manufacture during said period, and that no account of the tobacco and snuff so removed was kept as of removals thereof, and no accurate account of the tobacco and snuff so removed was kept in any manner in said books;"—that refers to the sales over the retail counter, of which no record was kept, as sales—"that large quantities of granulated tobacco and other descriptions of tobacco manufactured were sold by Mr. Lilienthal during said period, and that no account of such sales, as sales, was kept in those books; that quantities of purchased manufactured tobacco were sold and removed from the said premises during the period from August 1, 1866, to December 1, 1867, and that no accurate account of such sales or removals was kept in said books; that Exhibits numbered 1 to 17, both inclusive, were furnished to the assistant assessor of the district by the said C. A. Lilienthal or his agents, as

71 true and accurate abstracts of all such sales and removals and were not true and accurate abstracts thereof;"—that means not that they were not true and accurate abstracts of the books which Mr. Lilienthal kept, not that Mr. Dennerker did not transfer them accurately from his tax-book into the return, but that they were not, as recorded by Mr. Davis, true and accurate abstracts of the actual transactions—"that the annual inventories, Exhibits 18 and 19, were made out and delivered by said C. H. Lilienthal to the assistant assessor of the district, severally, as true statements and inventories of the matters and things therein contained, as required by the said 90th section as amended as aforesaid; that it appears from said inventory and abstracts that much more chewing-tobacco and fine shorts was manufactured in said manufactory during the year 1867 than was declared upon said abstracts to have been manufactured; that a large quantity of smoking-tobacco manufactured on said premises have been sold or removed during the year 1867, which had not been returned for taxation upon the said abstracts, and of which no account was contained therein or in said books, Exhibits Nos. 138 and 138A—then, the burden of proof is upon the claimant to satisfy the jury that the tobacco so manufactured on said premises and sold or removed without due account, return, and entry made thereof in the said books and abstracts, in the manner

required by law, was not so sold and removed in fraud of the internal-revenue laws, and with the intent to evade the taxes thereon; and if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent and that his possession of the goods in suit was with the like intent."

I also charge the second proposition: "If the jury find that prior to August 1, 1866, when the act of July 13, 1866, went into effect, changing in some respects the rates of taxation on manufactured smok-
72 ing-tobacco, a brand of smoking-tobacco known as 'extra long smoking-tobacco' had been manufactured by C. H. Lilienthal, by cutting together stripped or stemmed leaf and stems in certain proportions, and had been sold and returned for taxation by him as 'smoking-tobacco,' subject to a tax of thirty-five cents per pound under the existing law; that, from the time said act of July 13, 1866, went into effect, the said 'extra long smoking-tobacco,' manufactured as aforesaid, was entered by said Lilienthal in the account required to be kept in book-form by the ninetieth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, of sales and removals of manufactured tobacco, as 'chewing-tobacco,' and was returned upon the abstracts of said accounts required to be furnished monthly to the assistant assessor of the district, by said section, as 'chewing-tobacco,' subject to a tax of forty cents per pound, under the provisions of said act of July 13, 1866; that after the said 1st day of August, 1866, said C. H. Lilienthal varied the process of manufacturing said 'extra long smoking-tobacco,' by merely increasing the proportion of stem, and from the 21st day of August, 1866, in each monthly return during the years 1866 and 1867, returned for taxation sales and removals of large quantities of the 'extra long smoking-tobacco,' so manufactured as 'smoking-tobacco,' subject to a tax of fifteen cents per pound under the provisions of said act of July 13, 1866; that the said 'extra long smoking-tobacco,' returned as 'chewing-tobacco' for taxation at the rate of forty cents per pound, was sold at seventy cents per pound, and the said 'extra long smoking-tobacco,' returned as 'smoking-tobacco' for taxation at the rate of fifteen cents per pound, was sold at the rate of sixty cents per pound; that no officer of internal revenue was advised by C. H. Lilienthal, or his agents, of the said practice of returning the said 'extra long smoking-tobacco' for taxation at fifteen cents per pound;
73 that the Commissioner of Internal Revenue had published his instructions and opinion that tobacco so manufactured was subject, under the said act of 1866, to the tax of forty cents per pound, as 'smoking-tobacco,' and never directly or indirectly countenanced or sanctioned the practice of C. H. Lilienthal in returning the said 'extra long smoking-tobacco; and if the jury believe from these facts that said Lilienthal and his agents made the said change in the process of manufacturing the said 'extra long smoking-tobacco,' and the said change in the manner of returning the same for taxation, during the said period from August 1, 1866, to January 1, 1868, for the purpose of selling and removing the same in fraud of internal-revenue laws, and with intent to evade the payment of taxes thereon, then they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit."

I believe those are all the considerations which it is necessary to present to you in regard to this matter. You have listened patiently to the evidence, and to the summing up of the counsel, which has been exceedingly clear and thorough on both sides, and it is for you to say

on your oaths, what you believe to have been the intent of Mr. Lilienthal in respect to this property so seized. If the Government has not made out, to your satisfaction, that such intent to commit a fraud upon the law or to evade the payment of taxes, in respect either to the goods on hand or to the goods to be manufactured out of the raw materials on hand, existed on the part of Mr. Lilienthal at the time the goods were seized, your verdict will be for the claimant.

And, thereupon, the counsel for the claimant, as to certain specified parts of said charge of the court, took exception in the following language:

74 In the first place, I desire to except to that part of your honor's charge where you charge the jury that the Coleman tobacco, or the Kearney & Waterman tobacco, which was subsequently shipped to California, was made, by the act of March 3, 1865, liable to a tax of thirty-five cents; also, to that part of your honor's charge where you say that the transaction in the Kearney & Waterman tobacco was wholly illegal and in violation of law; also, to that part where your honor says that it was not legal to return that for tax; also, to that part where your honor says that, even if the jury believe that a return was made, and a tax of twenty-five cents a pound was paid on this tobacco, yet the duty on it had not been paid when the act of July 13, 1866, went into operation, within the meaning of section seventy of that act; also, to that part which charges that the law required Mr. Lilienthal to keep an account in his book of the quantities of tobacco manufactured, independent of and distinct from the account of the quantities sold, and that it was impossible to make the correct inventory required by the law, unless an account was kept of the quantities manufactured, independent of the quantities sold, and that the removal from the factory to the retail sales-room, at the times referred to in the evidence, was not a removal which authorized a return for taxation under the law.

And the several exceptions aforesaid were noted and allowed. And thereupon the counsel for the claimant, as to the refusal of the court to charge as requested in the 13th and 14th requests to charge on behalf of the claimant, then and there took an exception, and the exception was noted and allowed. And thereupon the counsel for the claimant, as to the charge of the court, upon the 10th request to charge on behalf of the claimant, further requested the court to charge, and the court charged the jury as follows:

"In the 10th request we say: If the jury shall find that, at the time of the shipment of the thirty-four hundred pounds and thirty-
75 six hundred pounds of tobacco, in 1867, to W. T. Coleman, in California, the claimant believed that all the tax due thereon to the Government had already been paid, then his failure to return said tobacco for taxation upon said shipment is no evidence of fradulent intent on the part of the claimant." Your honor charged that as requested, but in commenting on it, you stated to the jury that if they should find that Mr. Lilienthal believed that he was bound to pay that tax in March, 1865, and did pay it, then his failure to return the tobacco for tax in 1867 was no evidence of fraudulent intent. I take exception to that part of your honor's charge, and request your honor to charge that, if Mr. Lilienthal believed that he had a right to pay, independent of any question whether he was bound to pay, the fact that he did not subsequently pay in 1867 is no evidence of fraudulent intent.

The COURT. That is a new proposition, and is not embraced in the one you handed to me.

Mr. ROLLINS. I ask your honor so to charge.

The COURT. I do so charge; that if Mr. Lilienthal believed honestly, when he paid that tax, on the 31st of March, 1865, that, as between him and the Government, he, as a tobacco manufacturer, had at that time a right to pay that tax, there was no fraudulent intent in his so doing. There is no doubt of that.

And thereupon the counsel for the claimant, as to the charge of the court upon the request of the district attorney in both instances, then and there took an exception to such charges in each instance, and the exception was noted and allowed.

And thereupon the counsel for the claimant further requested the court to charge, and the court charged the jury as follows:

76 We endeavored to embrace in our requests all we deemed important, but one thing is suggested by your honor's charge, which I have no doubt your honor will charge, and that is this; that if the jury shall believe that the mode of returning for taxation the goods sold over the retail counter, by returning them at the time they were transferred to such retail counter, was adopted for the convenience of the claimant, and used without any fraudulent intent on the part of Mr. Lilienthal or his agents in his business as a manufacturer, such fact furnishes no evidence in support of a verdict of condemnation in this case.

The COURT. Yes, that is true. The mere naked fact that that was unlawful does not amount to anything; but if, it being so unlawful, the jury believe there was a fraudulent intent in so doing, it is to be taken into consideration. If the jury believe there was no fraudulent intent in it, it is not to be taken into consideration.

And thereupon the counsel for the claimant further requested the court to charge the jury as follows:

We made no request to charge as to the rate of tax that was really due on the "extra long smoking-tobacco," and we are inclined to think that the proposition of your honor, that it makes no difference, for the purposes of this case, what the rate of tax was, is correct; but, at the same time, as this case involves such a large sum of money, we are unwilling that any failure on our part to take proper exceptions should occur, and, therefore, we ask your honor to charge as follows: "If the jury find that, in the process of manufacturing the 'extra long smoking-tobacco,' a portion of the stem was removed from the leaf, and an amount of stem fully equal to or exceeding the quantity removed was subsequently, during said process, added to and intermingled with the leaf, so that, in point of fact, the manufactured product was com-

77 posed of both stem and leaf, and so sold, that tobacco was, between August, 1866, and the date of seizure, liable to a tax of only fifteen cents per pound, and was properly returned at that rate."

Which request on the part of the claimant the court then and there refused to charge, and the counsel for the claimant, to such refusal of the court so to charge, then and there took an exception, and the exception was noted and allowed; and thereupon the counsel for the claimant further requested the court to charge the jury as follows:

I also ask your honor to charge, "that the 'extra long smoking-tobacco,' if manufactured in the manner testified to by Mr. Dennerker, was smoking-tobacco made in part of stems, and was liable, under the act of July 13, 1866, to a tax of fifteen cents per pound during all the time subsequent to August 1, 1866, and prior to the date of seizure of the property proceeded against in this action."

Which request on the part of the claimant the court then and there

refused to charge, and the counsel for the claimant, to such refusal of the court so to charge, then and there took an exception, and the exception was noted and allowed.

And thereupon the counsel for the claimant further requested the court to charge the jury as follows:

I also ask your honor to charge, "that if the 'extra long smoking-tobacco,' returned as liable to the fifteen cents rate, was manufactured in the manner stated in the testimony of Mr. Dennerker, and contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, then the said tobacco was
78 liable, between August 1, 1866, and the time of the seizure of the property herein proceeded against, to the fifteen cents tax, as returned."

Which request on the part of the claimant the court then and there declined to charge, and the counsel for the claimant to such refusal of the court so to charge then and there took an exception, and the exception was allowed.

In testimony whereof I, Samuel Blatchford, judge of the said district court, have hereunto set my hand and seal this 13th day of December, 1871, and have directed this bill of exceptions to be filed in the clerk's office of the said district court *nunc pro tunc*, and as of the 8th day of May, 1871.

SAML. BATCHFORD. [L S.]

79 District court of the United States of America for the southern district of New York.

THE UNITED STATES
vs.
A QUANTITY OF MANUFACTURED TOBACCO, &C., &c. Christian H. Lilienthal, claimant.

And now, before judgment on the information aforesaid, the claimant, Christian H. Lilienthal, by his counsel, comes and moves the court here that judgment on the said information be arrested, and that the trial which was concluded in this case on the eighth day of May, A. D. 1871, be declared to have been a mistrial—

First. Because no verdict of the jury to whom the cause was committed on the 8th day of May, A. D. 1871, was recorded or filed before the jury were discharged.

80 Second. Because no verdict of the jury to whom the cause was committed on the 8th of May, 1871, was returned before the jury were discharged.

Third. Because when the jury returned into court on the 8th day of May, aforesaid, after considering of their verdict, and were inquired of by order of the court if they had agreed upon a verdict, it appears by the minutes of the clerk that their answer was, "They find for the United States, condemning the goods." And no other or different answer was made by the jury before they were discharged. And no other or different record was made thereon before the jury were discharged. And the jury were discharged and separated immediately after they had made the answer aforesaid. And the claimant now shows to the court here that the answer of the jury, so minuted as aforesaid, is not and was not a verdict upon the issues put to the jury under the information and the answer or pleas of the claimant lawful and sufficient to authorize the ren-

dition and entry by the court of a judgment of forfeiture of the property seized, or any part thereof.

C. H. LILIENTHAL,
By GEO. T. CURTIS,
Of Counsel.

(Endorsed:) (4.) A. 15. U. S. dist. court, S. D. of New York. A qty. of manuf'd tobacco, &c., at factory of C. H. Lilienthal, 221 Washington st., ads. The United States. Motion in arrest of judgment. Norris & Lord, pro. clt. Filed Jan. 6th, 1876.

81 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Monday, the 8th day of May, in the year of our Lord one thousand eight hundred and seventy-one.

Present: The honorable Samuel Blatchford, district judge.

THE UNITED STATES
vs.
A QUANTITY OF MANUFACTURED TOBACCO, &C., &c., at 221 Washington st. } A, 165.

This cause being still on trial, the eleven jurors empannelled and sworn therein are called, and severally answer to their names.

Charge is thereupon given by the court to the jury, who retire under the charge of an officer duly qualified to attend them, and upon their return they say that they find for the United States, condemning the goods, and so they say all.

On motion of Mr. Rollins, the U. S. attorney not opposing, it is ordered that the claimant herein have thirty days from this date to make a case, or turn the same into a bill of exceptions.

A true copy from the minutes.

GEO. F. BETTS,
Clerk.

82 (Endorsed:) Vol. A, No. 165, United States district court for the southern district of New York. The United States vs. A quty. of manufactured tobacco, &c., &c., 221 Washington st. Copy extract from minutes of court.

At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms in the city of New York, on Friday, the nineteenth day of January, in the year of our Lord one thousand eight hundred and seventy-two.

Present: The honorable Samuel Blatchford, district judge.

THE UNITED STATES OF AMERICA
vs.
A QUANTITY OF MANUFACTURED TOBACCO, &C., found at factory of C. H. Lilienthal, No. 221 Washington st. } A, 165–198.

83 This case having been heard on a motion (on the part of the claimant) in arrest of judgment, and argued and submitted by

the advocates for the respective parties, and due deliberation being had in the premises, it is now ordered, adjudged, and decreed by the court that the said motion in arrest of judgment be, and the same is hereby, denied.

SAML. BLATCHFORD.

(Endorsed:) Vol. A, No. 165–198. United States district court for the southern district of New York. The United States vs. A qty. of manuf'd tobacco, &c., Lilienthal's factory, 221 Washington st. Norris & Lord, proctors for clt. Decree denying motion in arrest of judgment, filed the nineteenth day of January, 1872.

84 At a stated term of the district court of the United States of America for the southern district of New York, held at the United States court-rooms, in the city of New York, on Saturday, the twenty-fifth day of May, in the year of our Lord one thousand eight hundred and seventy-two.

Present: The Honorable Samuel Blatchford, district judge.

THE UNITED STATES
vs.
A QUANTITY OF MANUFACTURED TOBACCO, &c., found at factory of C. H. Lilienthal, No. 221 Washington st., N. Y. } Vol. A, page 165, 202.

The jury empanneled to try the issue joined between the United States of America, informants, against A quantity of manufactured tobacco, &c., found at factory of C. H. Lilienthal, No. 221 Washington st., N. Y., of which C. H. Lilienthal is claimant, having by their verdict found for the United States, condemning the said goods, and the court on motion of counsel for said claimant having granted a stay of proceedings thereon for said claimant to file a bill of exceptions herein, and said bill of exceptions having been filed, it is thereupon, on motion of the United States district attorney, ordered that the above-mentioned goods, wares, and merchandise be, and the same are hereby, accordingly condemned as forfeited to the United States.

85 And it is further ordered, that unless a writ of error be taken to this decree, within the time limited and prescribed by the rules of court, that the stipulation for value and costs herein forthwith cause the engagement of their stipulation to be performed, in fulfilment and satisfaction of the said verdict and of this decree.

SAML. BLATCHFORD.

I have read the foregoing, and believe them to be correct in form.

G. T. CURTIS,
For Claimant.

(Endorsed:) Vol. A, No. 165. United States district court for the southern district of New York. The United States vs. A quantity of manufactured tobacco, &c., C. H. Lilienthal, clt. Noah Davis, U. S. dist. atty. Final decree on verdict. Filed the twenty-fifth day of May, 1872.

86 We admit due service of a copy, this 25th day of May, 1872.

NORRIS & LORD,
Attys. Clt.

By the honorable Samuel Blatchford, one of the judges of the circuit court of the United States for the southern district of New York, in the second circuit:

To the United States of America and Noah Davis, district attorney:

Whereas Christian H. Lilienthal, claimant of certain tobacco, tools, and implements, has sued out a writ of error from the circuit court of the United States for the southern district of New York, second circuit, to reverse a decree rendered by the judge of the district court of the United States for the southern district of New York, and in favor of the United States of America, in a cause of seizure of a quantity of tobacco, tools, and implements, seized at No. 221 Washington st., in the city of New York, and has filed the security required by law:

You are, therefore, hereby cited to appear before the said circuit court, at the city of New York, on the 5th day of June, inst., at a current term of the said circuit court, to do and receive what may appertain to justice to be done in the premises.

Given under my hand, at the city of New York, in the south-
87 ern district of New York, in the second circuit, the first day of June, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-sixth.

SAML. BLATCHFORD.

(Endorsed:) Vol. A, page 165–202. U. S. circuit court, southern district of New York. Christian H. Lilienthal, plaintiff in error, vs. The United States of America, defendants in error. Citation on writ of error. Norris & Lord, attorneys for plffs. in error, 171 Broadway.

I consent that the writ of error in this citation be entered as within directed, and be returnable on the fifth day of June, 1872.

N. DAVIS,
U. S. Atty.

Recd. June 1st, 1872.

88 Know all men by these presents that I, Christian H. Lilienthal, of Yonkers, in the county of Westchester and State of New York, tobacconist, am held and firmly bound unto the United States of America in the sum of one hundred and five thousand dollars, to be paid to the said United States. For the payment of which, well and truly to be made, I bind myself and my heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with my seal, and dated the first day of June, in the year of our Lord one thousand eight hundred and seventy-two. Whereas I, the said Christian H. Lilienthal, as plaintiff in error, hath prosecuted a writ of error issuing out of the circuit court of the United States for the southern district of New York, in the second circuit, to reverse the judgment of the district court of the United States for the said southern district, bearing date the 25th day of May, 1872, in a suit in which the United States are informants, against a quantity of tobacco, tools, and implements, seized on the premises, No. 221 Washington street, in the city of New York. Now, therefore, the condition of this obligation is such, that if the above-named plaintiff in error, Christian H. Lilienthal, shall prosecute said writ of error with effect, and pay all damages and costs which shall be awarded against him as such plaintiff in error therein, if he shall fail

to make said writ of error good, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

CHRISTIAN H. LILIENTHAL. [L. S.]

Sealed and delivered, and taken and acknowledged, this first day of June, A. D. 1872, before me.

SAML. BLATCHFORD.

89 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Christian H. Lilienthal, being duly sworn, doth depose and say that he resides in the southern district of New York; that he is worth the sum of five hundred thousand dollars, over and above all his just debts and liabilities.

CHRISTIAN H. LILIENTHAL.

Sworn to, this 1st day of June, A. D. 1872, before me.

SAML. BLATCHFORD.

This bond approved as to form and amount and sufficiency of surety. Dated New York, June 1st, 1872.

SAML. BLATCHFORD,
District Judge.

90 (Endorsed:) A, 165–202. United States circuit court, for the southern district of New York, in the second circuit. Christian H. Lilienthal, claimant of a qt'y of manuf'd tobacco, &c., found at factory No. 221 Washington st., N. Y., plaintiff in error, vs. The United States of America, defendant in error. Bond for damages and costs on writ of error. Norris & Lord, attorneys for plaintiff in error. Filed this 1st day of June, 1872.

91 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the first day of November, in the year of our Lord one thousand eight hundred and seventy-two.

Present: the honorable Lewis B. Woodruff, circuit judge.

CHRISTIAN H. LILIENTHAL, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES OF AMERICA, DEFENDANT in error.

The argument on the writ of error in the above-entitled cause coming on to be heard:

Mr. George T. Curtis argues in favor of the plaintiff in error.

Mr. Thomas Simons argues in favor of the defendant in error.

Mr. George Morris argues in reply.

Curia advisare vult.

92 Circuit court of the United States for the southern district of New York.

CHRISTIAN H. LILLIENTHAL, PLFF. IN ERROR,
vs.
THE UNITED STATES OF AMERICA, DEFT. IN error.

WOODRUFF, J. It is unnecessary for me to say more in this case than that I concur in the conclusion of the district judge on the motion

in arrest of judgment, and am of opinion that there was no error in his charge to the jury. It was favorable to the plaintiff in error, and the requests for instructions not given were, I think, properly declined.

Judgment affirmed with costs.

(Endorsed:) Circuit court of the United States for the south. dist. of New York, Christian H. Lillenthal v. The United States. Filed Dec. 22, 1872.

93 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms, in the city of New York, on Friday, the 19th day March, in the year of our Lord one thousand eight hundred and seventy-five.

Present: the honorable Lewis B. Woodruff, circuit judge.

THE UNITED STATES, DEFENDANTS IN ERROR,
v.
A QUANTITY OF MANUFACTURED TOBACCO, &c., &c., C. H. Lilienthal, claimant, plaintiff in error.

This cause coming on to be heard on the return of the record and proceeding therein to the writ of error issued therein, on behalf of the said claimant, plaintiff in error, on hearing George T. Curtis, esq., for the said plaintiff in error, and Thomas Simons, assistant United States attorney for the defendants in error, and upon due consideration of the premises, it is hereby ordered and decreed that the judgment of the district court in this cause be and the same hereby is in all things affirmed with costs.

Enter.

L. B. WOODRUFF,
Circuit J.

Form of decree correct.

NORRIS & LORD,
Attys. for Clt.

94 (Endorsed:) U. S. C. C., S. D. of N. Y. Lilienthal v. The United States. Decree of affirmance. Filed Mch. 20, 1875.

95 The President of the United States of America to the hon. the justices of the Supreme Court of the United States.

Complaining showeth unto your honors, Christian H. Lilienthal, that in the district court of the United States for the southern district of New York, under a libel of information and seizure filed by and in the name of the United States, certain manufactured and unmanufactured tobacco, and certain tools and other personal property, were, by the judgment of said district court, rendered on the 25th day of May, 1872, declared to be forfeited to the United States for certain alleged causes in said information set forth, the same being the property of this complainant at the time of the seizure, and being duly claimed by him in said proceedings; and further complaining showeth unto your honors that in the circuit court of the United States for the southern dis-

96 trict of New York, on appeal by writ of error from the said judgment hereinbefore set forth, the said judgment was by the said circuit court affirmed, and that in the record and proceedings, and in the rendition of the judgment aforesaid, and in the judgment of affirmance aforesaid, manifest error hath happened to the great damage of the complainant, in this, to wit:

First. Because no verdict of the jury, to whom the cause was com-

mitted on the 8th day of May, A. D. 1871, was recorded or filed before the jury was discharged.

Second. Because no verdict of the jury, to whom the cause was committed on the 8th day of May, 1871, was returned before the jury were discharged.

Third. Because when the jury returned into court on the 8th day of May, 1871, aforesaid, after considering of their verdict, and were inquired of, by order of the court, if they had agreed upon a verdict, it appears by the minutes of the clerk that their answer was: "They
97 find for the United States, condemning the goods." And no other or different answer was made by the jury before they were discharged. And the jury were discharged and seperated immediately after they had made the answer aforesaid. And the claimant now shows to the court here that the answer of the jury, so minuted as aforesaid, is not and was not a verdict upon the issues put under the information; and the answer or pleas of the claimant lawful and sufficient to authorize the rendition and entry by the court of a judgment of forfeiture of the property seized or any part thereof.

Fourth. That because the said judgment was rendered and entered without any verdict of the jury empanneled to try the issues between the United States and the claimant, having been duly and lawfully returned and affirmed and recorded before the jury were discharged, as is fully set forth in a motion for arrest of judgment, filed by this com-
98 plainant in said district court, and overruled by the presiding judge, and now remaining of record in the said district court.

Fifth. Because in the trial of the issues between the United States and this complainant, under the information aforesaid, and in charging and instructing the jury empannelled to try the same, certain errors were committed by the presiding judge of the said court, as will fully and specially appear by the bill of exceptions duly signed and sealed by the said judge, and now remaining of record in said district court.

Wherefore, this complainant prays that a writ of error may be issued out of this honorable court, to remove into this court the record of judgment aforesaid, to the end that the error therein appearing may be corrected, as of right and according to the law and custom of the United States, and that justice in the premises may be done.

CHRISTIAN H. LILIENTHAL.

Signed at the city of New York, in the said southern district of New York, on this 20th day of May, 1875.

R. E. STILWELL,
U. S. Comr.

(Indorsed:) Complaint. Norris & Lord, attys. for, 171 Broadway, N. Y. City. Filed May 20, 1875.

99 Circuit court of the United States of America for the southern district of New York, in the second circuit.

Bond for value and costs.

CHRISTIAN H. LILIENTHAL, CLAIMANT OF certain manufactured and unmanufactured tobacco, &c., plaintiff in error,
vs.
UNITED STATES OF AMERICA, DEFT. IN error.

Know all men by these presents that I, Christian H. Lilienthal, of Yonkers, in the county of Westchester and State of New York, tobac-

conist, am held and firmly bound unto the above-named United States of America in the sum of two hundred and ten thousand dollars, to be paid to the said United States, for the payment of which, well and truly to be made, bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal and dated the 20th day of May, in the year of our Lord one thousand eight hundred and seventy-five.

Whereas the above-named Christian H. Lilienthal hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

Now, therefore, the condition of this obligation is such that if the above-named plaintiff in error shall prosecute said writ of error to effect, and answer all damages for value of the goods forfeited, and costs, if he fail to make such writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CHRISTIAN H. LILIENTHAL.

Sealed and delivered, and taken and acknowledged, this 20 day of May, 1875, before me.

R. E. STILWELL,
U. S. Comm'r.

I agree to accept the foregoing bond of the claimant, without sureties, as a sufficient bond to secure costs in the Supreme Court on writ of error to the circuit court in this action, and as establishing the present sufficiency of the claimant and his responsibility for the amount of the value of the property condemned secured by bond in the district court, but not to affect the obligation of such bond on the claimant and sureties therein. New York, May 20, 1875.

GEORGE BLISS,
U. S. Atty.

100 The foregoing bond is understood by the obligor to be given on the terms and with the effect mentioned in the foregoing acceptance of the United States attorney.

New York, May 20, 1875.

NORRIS & LORD,
Attys. for Plff.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

Christian H. Lilienthal, being duly sworn, doth depose and say that he is worth the sum of two hundred and ten thousand dollars over and above all his just debts and liabilities.

CHRISTIAN H. LILIENTHAL.

Sworn to this 20th day of May, A. D. 1875, before me.

R. E. STILWELL,
U. S. Comm'r for the Southern District of New York.

The foregoing bond is approved as to form and amount and sufficiency. Stay of proceedings on the judgment is granted.

New York, May 20, 1875.

WARD HUNT,
Ass. Just. Sup. Ct. U. S.

(Indorsed:) Vol. page . U. S. circuit court. Christian H. Lilienthal, plff. in error, vs. The United States of America, deft. in error. Bond for costs on Proctor. Filed this 20 day of May, 1875.

101 UNITED STATES OF AMERICA, *ss:*

To the United States of America and George Bliss, district att'y:

Whereas Christian H. Lilienthal, claimant of certain tobacco, tools, and implements, has sued out a writ of error from the Supreme Court of the United States, to reverse a decree rendered by the judges of the circuit court of the United States for the southern district of New York, and in favor of the United States of America, in a cause of seizure of a quantity of tobacco, tools, and implements, seized at No. 221 Washington street, in the city of New York, and has filed the security required by law:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October, 1875, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the United States, wherein
102 Christian H. Lilienthal is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Morrison R. Waite, Chief-Justice of the Supreme Court of the United States, this 20th day of May, in the year of our Lord one thousand eight hundred and seventy-five, and of the Independence of the United States the ninety-ninth.

WARD HUNT,
Ass. Justice Sup. Court U. S.

103 (Indorsed:) United States Supreme Court. Christian H. Lilienthal, plff in error, against The United States of America, def'ts in error. Citation. Filed May 22, 1875. Norris & Lord, attorneys for claimant and plff's in error, 171 Broadway, New York City.

Due service of a copy of the within citation is hereby admitted.
New York, May 21, 1875.

GEORGE BLISS,
U. S. Att'y.

(Indorsement on cover:) No. 373. Christian H. Lilienthal, plaintiff in error, vs. The United States. S. New York C. C. U. S. Filed 28 September, 1875.

In the Supreme Court of the United States.

No. 137.

CHRISTIAN H. LILIENTHAL,
Plaintiff in Error,

Vs.

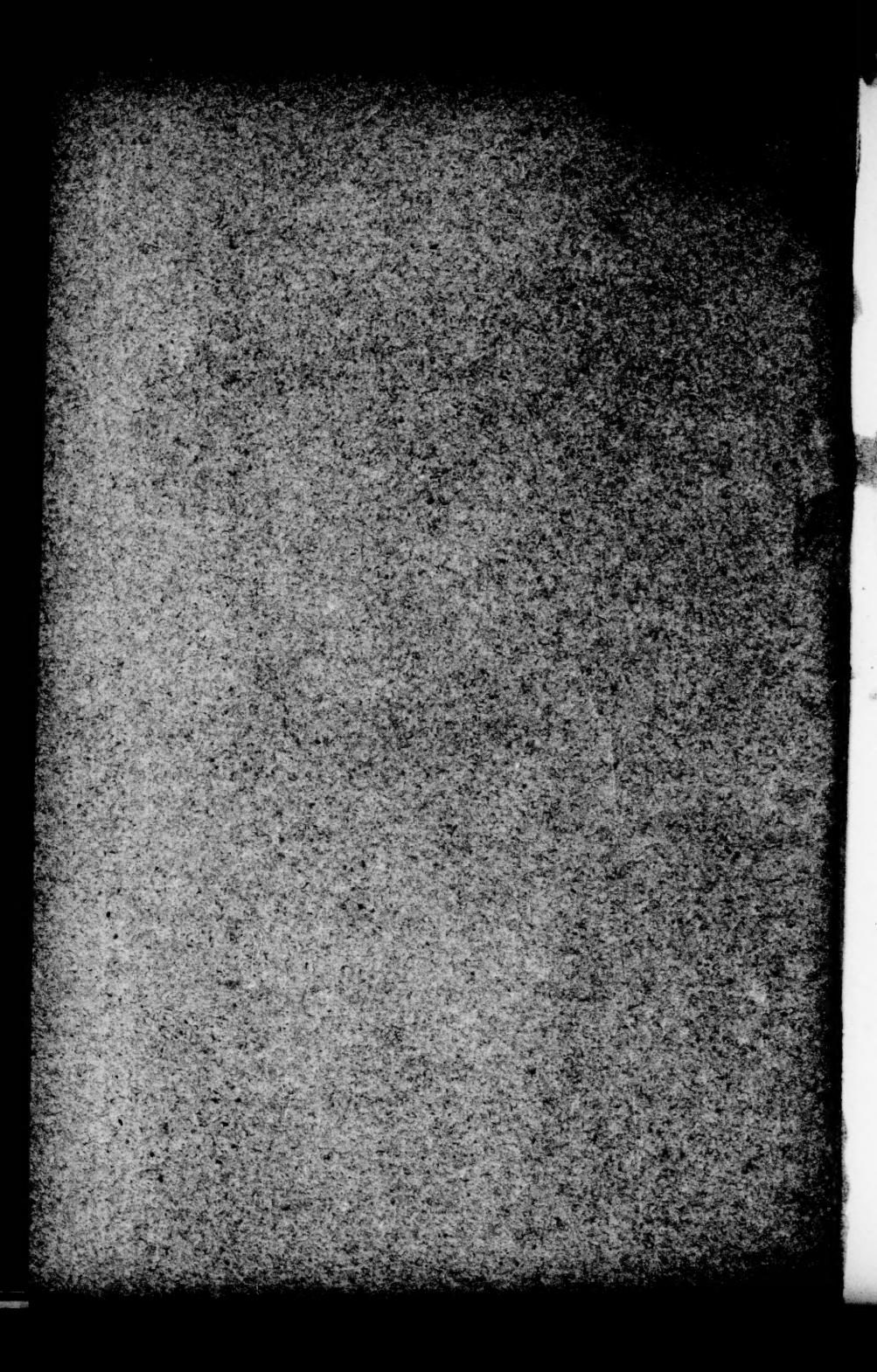
THE UNITED STATES.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

R. T. MERRICK,
M. F. MORRIS,
For Plaintiff in Error.

Judd & Detweiler, Printers



Supreme Court of the United States.

No. 137.

CHRISTIAN H. LILIENTHAL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Southern District of New York.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

I. STATEMENT OF CASE.

This is a suit instituted by the United States in the district court for the southern district of New York, to enforce the forfeiture and condemnation of certain tobacco and other personal property of the appraised value of $104,391.78, seized as the property of Christian H. Lilienthal, the plaintiff in error, at his factory, in the city of New York, by the collector of internal revenue for the district, on the 25th day of March, 1868, under the provisions, as it is claimed, of the 48th section of the act of Congress of June 30, 1864, known as "An act to provide internal revenue to support the Gov-

ernment, to pay interest on the public debt, and for other purposes," as amended by the act of July 13, 1866, for an alleged intention to violate the internal revenue laws of the United States.

The statute under which the seizure was made reads as follows: "All goods, wares, merchandise, articles, or objects, on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control of any person or persons, for the purpose of being sold or removed by such person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and the same shall be forfeited to the United States; and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax; and also all tools, implements, instruments, and personal property whatsoever in the place or building, or within any yard or inclosure, where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector, and the same shall be forfeited, as aforesaid; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding *in rem* in the circuit or district court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction.

"And any person who shall have in his custody or possession any such goods, wares, merchandise, articles, or

objects, subject to tax, as aforesaid, for the purpose of selling the same with the design of avoiding payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction."

Lilienthal appeared and gave bond in the sum of $104,391.78, the appraised value of the property, according to the provisions of the law; and the property was thereupon released to him.

The testimony given upon the trial in the district court consisted entirely of other facts concerning Lilienthal's business, having no relation whatever to the property seized, or dealings therewith, which were claimed by the prosecution to show the existence of a fraudulent intent on his part to evade the internal revenue laws, and from which it was argued that a similar fraudulent intent might be inferred to exist in regard to the property under seizure. These facts were substantially the following:

1st. That for seventeen months, extending from August 1, 1866, to January 1, 1868, Lilienthal manufactured and sold, and returned for taxation at the rate of fifteen cents per pound, large quantities of tobacco, of which a considerable amount was claimed by the prosecution to have been liable to a tax of forty cents per pound; and that Lilienthal was aware that the higher rate was the proper one under the law.

The act of July 13, 1866, which went into effect on August 1, 1866, and was the law during the seventeen months in question, provided for taxation on tobacco as follows:

"On smoking tobacco, sweetened, stemmed, or butted, a "tax of forty cents a pound. On smoking tobacco of all "kinds, not sweetened, nor stemmed, nor butted, including "that made of stems or in part of stems, and imitations "thereof, a tax of fifteen cents per pound."

14 Statutes, p. 98, 133.

Tobacco sweetened is where molasses is added in its manufacture. Tobacco, stemmed and butted, is tobacco made of the leaf after the stem or central fibre has been removed, and is the finest kind. Tobacco not stemmed and butted, is that manufactured from stem and leaf together without separation, or from stems alone, and is of an inferior character. The tobacco returned by Lilienthal for taxation at the rate of fifteen cents a pound, was manufactured by a process peculiar to himself, by the removal in the first instance of the larger portion, but not the whole of the stem; the preparation of the leaf and remaining stem in a special manner; and the subsequent addition thereto of the previously removed stem or a greater amount of stems; — a kind of tobacco which the Internal Revenue Bureau itself decided, by letter dated August 26, 1867, to be subject to a tax only of fifteen cents.

Record, p. 9, 10, 11.

It is claimed that this tobacco was really liable to a tax of forty cents a pound; that under the impression that it was so liable, Lilienthal returned it at that rate for the first twenty days of the period referred to, that is, from August 1, 1866, to August 20, 1866; that he afterwards increased the proportion of stem to leaf, and returned the article at

the rate of fifteen cents a pound, though the diminution of price to the public did not correspond to the diminution in the rate of taxation; and that this conduct on the part of Lilienthal manifested an intention to defraud the revenue.

2d. That Congress having on March 3, 1865, passed an amendment to the Internal Revenue Laws, which was to go into effect on April 1, 1865, whereby a certain kind of tobacco, which at the time of the passage of that amendment and previously thereto, was, and up to April 1, 1865, continued to be, subject to a tax of twenty-five cents a pound, was thereafter made liable to a tax of thirty-five cents a pound, Lilienthal, on March 8, 1865, with the alleged purpose of escaping the increased rate that was to ensue, returned for taxation at the then existing rate of twenty-five cents per pound, a certain quantity of such tobacco, previously manufactured by him and which he had then on hand, and which is designated in the record as "Orinoco Tobacco;" and went through the form of a ficticious sale and repurchase thereof; although the same was not actually sold and removed from the premises until April, 1867, when it was shipped to California, and when the rate of taxation had been reduced again from thirty-five cents to fifteen cents a pound. He had paid the tax in March, 1865, at the rate of twenty-five cents per pound—which was more than he would have been required to pay at the time of actual sale in April, 1867.

It is claimed that this whole transaction, although shown to have been made in pursuance of the advice of members of the Finance Committee of the Senate of the United States, and without any concealment on the part of Lilien-

thal, was an entirely illegal transaction, and manifested a fraudulent intent punishable under the Revenue Laws.

Record, pp. 12, 13, 14.

3d. That, during the seventeen months above mentioned, Lilienthal had been in the habit of returning certain tobacco in bulk for taxation as manufactured and sold by him, when in fact such tobacco was only removed from the wholesale to the retail department of the establishment, where it was sold out in small quantities, and no account of such small sales kept except by cash-book. (Record, p. 15.)

It is claimed that such return for taxation was an illegal transaction, evidencing a fraudulent intent to evade the revenue laws, although no loss of revenue could thereby, or did actually, accrue to the United States; and Lilienthal claimed that the arrangement was entirely for the convenience of his business.

4th. That Lilienthal, during the said period of seventeen months kept no proper books of account, as required by law, inasmuch as he kept no account of his manufactures separate from the account of his sales; and in the returns which he made to the collector or assessor he entered the same precise amounts under the head of *manufactures* and under the head of *sales*, for which the data were furnished merely from the account books in which had been entered the orders of his customers from time to time. Testimony was given, in this connection, to show the impracticability of keeping separate accounts, as the manufacture was never fully completed before an order came for a sale.

Record, pp. 14, 15.

5th. That during the same period Lilienthal had sold and removed from the premises considerable quantities of tobacco not of his own manufacture, but purchased by him, of which no account had been kept in his books.

Record, p. 14.

6th. That by comparison of his annual inventories for January 1, 1867, and January 1, 1868, with his monthly returns and abstracts during the intermediate time, it appeared that they did not agree, and that there was a deficiency of amount in some particulars and an excess in others, though there was no claim of any loss of revenue to the Government. By the testimony of the principal witness for the Government, who was Lilienthal's foreman, it was sought to account for this alleged discrepancy by the fact that it was Lilienthal's custom to fill orders from the stock at the retail counter when it was not convenient to do so from other stock, and that the stock at the retail counter having been returned for taxation at the time of its transfer thither, orders filled from there would not appear again in the returns.

Record, pp. 17–21.

This was substantially all the testimony in the case. There was no evidence whatever of any actual fraud upon the revenue, or of any attempted evasion of the revenue laws in regard to the actual property seized and sought to be forfeited. Neither was there any claim or pretence whatsoever that any revenue had been lost to the Government.

Upon this testimony fourteen prayers were presented on behalf of the claimant for instructions to the jury, twelve of which were granted, and two refused. The latter are those numbered 13 and 14 on page 22 of the Record. Number 13 was substantially to the effect that there was no evidence that Lilienthal had not paid all taxes due to the Government. And No. 14 was to the effect that there was no evidence that any goods had been sold or removed by Lilienthal in fraud of the internal revenue laws, or to avoid payment of taxes.

On the part of the Government two instructions were asked for and granted. The first, to the effect that, under the circumstances recited, the burden of proof was on the claimant to show that the tobacco, as manufactured and sold, had not been sold and removed in fraud of the internal revenue laws; and that if he failed to satisfy the jury on that point they might infer the existence of a fraudulent intent on his part in respect to the goods in suit in this case; and the second, to the effect that, if the jury believed that certain changes in the mode of manufacturing a certain kind of tobacco, by increasing the proportion of stem, had been adopted by Lilienthal with the view of evading the revenue laws, they would have a right to infer the existence of a fraudulent intent on his part in reference to the property in suit.

Record, pp. 22, 23.

Exceptions were taken to the refusal of the court to grant the claimant's prayers Nos. 13 and 14, and to the granting of the two prayers offered on behalf of the Government.

The court charged the jury at length, rehearsing and virtually adopting the whole argument on behalf of the Government; and exceptions were taken by the claimant to various portions of the charge. Further prayers were then offered on behalf of the claimant, some of which were granted, and some refused; and to the refusal exception was taken.

The jury returned a verdict "for the United States, condemning the goods." A motion in arrest of judgment, on account of the alleged irregularity of the verdict, was overruled. Judgment was entered for the United States, and was affirmed in the circuit court; and from the decision of this latter tribunal, the case comes here on writ of error sued out by Lilienthal, the claimant.

II.

Assignment of Errors relied on by Claimant.

1. The court below erred in refusing to grant the claimant's thirteenth prayer: "That there is no evidence in this action, that, at the time of the finding or seizure of the property in this action, the claimant had not paid all the taxes due on all the goods, wares, merchandise, articles, or objects, which had been before that date manufactured at his factory and sold or removed therefrom." (Record, pp. 22, 36.)

2. The court below erred in refusing to grant the claimant's fourteenth prayer: "That there is no evidence in this

action that any goods, wares, merchandise, articles, or objects on which taxes were imposed by the provisions of law, manufactured at the factory of Mr. Lilienthal, were ever sold or removed by him, or by any other person, in fraud of the internal revenue laws, or with design to avoid payment of said taxes." (Record, pp. 22, 36.)

3. The court below erred in refusing the claimant's following prayer: "If the jury find that, in the process of manufacturing the 'extra-long smoking tobacco," a portion of the stem was removed from the leaf, and an amount of stem fully equal to or exceeding the quantity removed was subsequently, during said process, added to and intermingled with the leaf, so that, in point of fact, the manufactured product was composed of both stem and leaf, and so sold, that tobacco was, between August, 1866, and the date of seizure, liable to a tax of only fifteen cents per pound, and was properly returned at that rate." (Record, p. 39.)

4. The court below erred in refusing the claimant's further prayer, "that the 'extra long smoking tobacco,' if manufactured in the manner testified to by Mr. Dennerker, was smoking tobacco made in part of stems, and was liable, under the act of July 13, 1866, to a tax of fifteen cents per pound during all the time subsequent to August 1, 1866, and prior to the date of seizure of the property proceeded against in this action." (Record, p. 39.)

5. The court below erred in refusing the claimant's further prayer, "that if the 'extra long smoking tobacco,' returned as liable to the fifteen cents rate, was manufactured

in the manner stated in the testimony of Mr. Dennerker, and contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, then the said tobacco was liable, between August 1, 1866, and the time of the seizure of the property herein proceeded against, to the fifteen cents tax, as returned." (Record, p. 40.)

6. The court below erred in granting the first prayer asked on behalf of the Government: "If the jury find that, &c., &c., &c., (setting forth certain evidence,) then the burden of proof is upon the claimant to satisfy the jury that the tobacco so manufactured on said premises and sold or removed without due account, return, and entry made thereof in the said books and abstracts, in the manner required by law, was not so sold and removed in fraud of the internal revenue laws, and with the intent to evade the taxes thereon; and if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent, and that his possession of the goods in suit was with the like intent." (Record, pp. 22, 36.)

7. The court below erred in granting the second prayer asked on behalf of the Government: "If the jury find that, &c., &c., &c., (setting forth certain evidence;) and if the jury believe from these facts that said Lilienthal and his agents made the said change in the process of manufacturing the said 'extra long smoking tobacco,' and the said change in the manner of returning the same for taxation, during the said period from August 1, 1866, to January 1, 1868, for the

action that any goods, wares, merchandise, articles, or objects on which taxes were imposed by the provisions of law, manufactured at the factory of Mr. Lilienthal, were ever sold or removed by him, or by any other person, in fraud of the internal revenue laws, or with design to avoid payment of said taxes." (Record, pp. 22, 36.)

3. The court below erred in refusing the claimant's following prayer: "If the jury find that, in the process of manufacturing the 'extra-long smoking tobacco," a portion of the stem was removed from the leaf, and an amount of stem fully equal to or exceeding the quantity removed was subsequently, during said process, added to and intermingled with the leaf, so that, in point of fact, the manufactured product was composed of both stem and leaf, and so sold, that tobacco was, between August, 1866, and the date of seizure, liable to a tax of only fifteen cents per pound, and was properly returned at that rate." (Record, p. 39.)

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6. The court below erred in granting the first prayer asked on behalf of the Government: "If the jury find that, &c., &c., &c., (setting forth certain evidence,) then the burden of proof is upon the claimant to satisfy the jury that the tobacco so manufactured on said premises and sold or removed without due account, return, and entry made thereof in the said books and abstracts, in the manner required by law, was not so sold and removed in fraud of the internal revenue laws, and with the intent to evade the taxes thereon; and if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent, and that his possession of the goods in suit was with the like intent." (Record, pp. 22, 36.)

7. The court below erred in granting the second prayer asked on behalf of the Government: "If the jury find that, &c., &c., &c., (setting forth certain evidence;) and if the jury believe from these facts that said Lilienthal and his agents made the said change in the process of manufacturing the said 'extra long smoking tobacco,' and the said change in the manner of returning the same for taxation, during the said period from August 1, 1866, to January 1, 1868, for the

purpose of selling and removing the same in fraud of the internal revenue laws, and with intent to evade the payment of taxes thereon, then they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit. (Record, pp. 23, 37.)

8. The court below erred in charging the jury as follows: "Under the act of March 3, 1865, which was to go into effect on the first of April, 1865, this tobacco (that known as the Orinoco tobacco,) which, up to the close of the 31st of March, 1865, was liable to a tax of twenty-five cents a pound, would have been liable to a tax of thirty-five cents a pound." (Record, p. 29, line 29.)

9. The court below erred in charging the jury as follows: "It is my duty to say to you that that transaction (the affair of the Orinoco tobacco) was utterly illegal." (Record, p. 29, line 55.)

10. The court below erred in charging the jury as follows: "Now, it was illegal to return the Orinoco tobacco for tax, because it was not sold, nor was it removed for consumption." (Record, p. 30.)

11. The court below erred in charging the jury as follows: "It is claimed, on the part of the defense, that, inasmuch as the tax of twenty-five cents a pound had once been paid upon this Orinoco tobacco, there was no obligation on the part of Mr. Lilienthal to make a subsequent return of it, and to pay another tax on it; and that this was the case, *a fortiori*, if, as was the fact, at the time the tobacco was sent to California, the tax on it would have been fifteen cents a

pound. In this connection, reference was made to the following provision in the seventieth section of the act of July 13, 1866, which went into effect on the 1st of August, 1866, and was in force when this Orinoco tobacco was sent to California, in April and May, 1867: 'All manufactures and productions on which a duty was imposed by either of the acts repealed by this act'—which embraces the provisions imposing duties on tobacco contained in the previous act of June, 1864, which was the act in force when this tobacco was returned for tax on the 31st of March, 1865—'which shall be in the possession of the manufacturer or producer, or of his agent or agents, on the day this act takes effect, the duty imposed by any such former act not having been paid shall be held and deemed to have been manufactured or produced after such date.' The defense contends that the duty on this tobacco had been paid, within this provision. But that is not the law. The law says all manufactures 'on which a duty was imposed,' 'the duty imposed' by the act of 1864 not having been paid. Now, no duty was imposed on this Orinoco tobacco. A duty was imposed upon it only when it was sold in good faith, or removed for consumption. There was no duty imposed upon it at the time it was returned for tax at twenty-five cents a pound. The claimant had no right to return it at twenty-five cents, particularly when it is acknowledged by himself on the stand that he did so for the purpose of getting rid of the coming thirty-five cents duty, and when, therefore, it is clear that there was an intent to commit a fraud on the Government. The act of 1866 only applies to the payment of a duty which has been imposed. Otherwise, a party would be able to take advantage of his own wrong,

by paying a tax of twenty-five cents a pound for the purpose of getting rid of a tax of thirty-five cents that was going into effect next day, and paying the tax when the law gave him no right to pay it, and afterwards to say that, because he had paid it, there was no intent to defraud the Government, and that thus the fraud so committed was condoned. The law is not so. The law merely says, that if a tax which has been imposed has been paid, no tax can be collected again on the same article. You are to consider the question not solely in the light of the fact that the law happened to be altered again, and the duty to be reduced from thirty-five cents to fifteen cents a pound, before the tobacco was sent to California, but also in the light of what Mr. Lilienthal did, and what his intent was, in regard to the tobacco, as bearing upon his intent in regard to the tobacco found in his possession when his establishment was seized." (Record, pp. 30–31.)

12. The court below erred in charging the jury, as follows: "It was a clear violation of law not to keep an account of goods manufactured (as well as of goods sold.)" (Record, p. 32.)

13. The court below erred in charging the jury, as follows: "Unless a record be kept of goods manufactured it is impossible for the manufacturer to comply with the law by handing in, every January, a true statement of all the goods on hand, specifying which of them were manufactured or produced by him, and which of them were purchased." (Record, p. 32.)

14. The court below erred in charging the jury, as fol-

lows: "There are large quantities of granulated tobacco found in the order books that are not found in the specific items in the tax books, and large quantities of granulated tobacco returned for tax in the tax books which cannot be identified with any specific items in the order books. A great many items were identified, and in regard to those which could not be you will recollect the testimony of Mr. Dennerker. When asked "Where did the granulated tobacco come from which filled the orders in the order books which cannot be identified as items in the tax books?" it was part, he said, of a large mass that had been entered for tax on a certain day, and taken down stairs into the retail counter department. Under the law that was a wholly illegal mode of doing business. Mr. Lilienthal had no right arbitrarily to take a quantity of Killickinick tobacco and return it for tax and remove it down stairs into his retail counter department, or into any other part of his premises, and peddle it out by the pound from day to day for an indefinite period of time." (Record, p. 33.)

15. The court below erred in entering judgment upon the verdict of the jury, inasmuch as said verdict was irregular, null and void. (Record, p. 40.)

16. The court below erred in entering any judgment whatever against the claimant or his property in the premises, as no such judgment is warranted by law.

III.

ARGUMENT.

A.

1.

On behalf of the plaintiff in error it is submitted that the judgment rendered against him in this cause was contrary to law, founded upon a misconception of the statutes, and wholly unjustified by the evidence. This is believed to be the first instance in the legislative or judicial annals of our country, where it has been sought to punish a mere intent, unaccompanied by any overt act, with a punishment more suitable for a barbarous age than for the nineteenth century, the forfeiture of all a man's personal property and the total destruction of his business. It is believed that no just and enlightened court will permit such a procedure without very plain warrant of law and very distinct and conclusive evidence of guilt on the part of the person implicated.

2.

It appears that the whole and only ground for this proceeding was the existence of an alleged fraudulent intention on the part of the claimant Lilienthal in respect to the internal revenue laws of the United States. If such an intention is punishable, as claimed in this suit, the proof of it should be clear *beyond reasonable doubt*. What was the proof in this case? None whatever as to the property

seized, and testimony only of four or five facts of previous occurrence, (Record, p. 25, line 50,) from which the jury were told they might infer a fraudulent intent on the part of the claimant, and, *unless disproved by him*, a further fraudulent intent in reference to the property in suit in this proceeding. Now, we presume that it is a plain principle of the law of evidence, that, whenever it is proper, as in a few cases it is, to show a fraudulent or illegal motive by proof of other acts evidencing a fraudulent or illegal motive on the part of the person proceeded against, the acts themselves so given in evidence must be fraudulent or illegal.

An act which is perfectly legal cannot, under any circumstances, be of itself evidence of fraud or illegality, no matter how corrupt or immoral may be the motive of the actor; just as, *e converso*, an illegal action, no matter how pure and just the motive that may have inspired it, cannot be allowed in any rational system of jurisprudence to pass unpunished. It is elementary reason, in this age of the world, that human laws are not competent to take cognizance of mere motives alone, apart from the illegal acts into which they become formulated.

If, therefore, any of the acts introduced in evidence in this case, to show fraudulent intent on the part of Lilienthal, were in themselves legal and proper acts, it was certainly error on the part of the court below to have admitted them. Now, it is not at all clear that any of the acts in question were illegal; and, the court below to the contrary notwithstanding, at least four of them were perfectly legal transactions.

3.

In the first place, the tobacco returned by Lilienthal from August 20, 1866, to January 1, 1868, for taxation at the rate of fifteen cents per pound, was actually subject to that rate and no other; and the Internal Revenue Bureau so ruled in its letter of August 26, 1867, (Record p. 11.) It was tobacco "*not sweetened, nor stemmed, nor butted, and made in part of stems.*" Lilienthal's mode of manufacture, in first removing and afterwards replacing the stem, made no essential difference in the *quality* of the tobacco; and it was in respect to the *quality* that Congress had established the different rates of taxation. Lilienthal's conduct throughout the whole of this transaction is ~~properly~~ perfectly consistent with a full and faithful compliance with the internal revenue laws.

That this tobacco was subject to no greater tax than stated in the return thereof made by Lilienthal, and that his conduct in regard thereto had been in conformity to law, seems to have been fully appreciated by the court below; and yet the transaction was allowed to go the jury, and they were told in the charge (Record, p. 28, line 56.) "That entirely irrespective of any determination, as matter of law, *as to what in fact the tax on that tobacco was, it is for you to say what inference you will draw from all this testimony in regard to the intent Mr. Lilienthal had in respect to this 'extra long smoking tobacco.'*" When the court was especially requested by counsel to construe the statute in so far as it related to the amount of tax to which this tobacco was liable, and inform the jury what amount should have been imposed and paid thereon, in order that they might be en-

lightened as to the motives and intentions of Lilienthal in the transaction, *it refused to give any construction whatever*, in the particular referred to. Record p. 39, line 77.

The jury were thus left in the dark as to a most material and important fact in the case, which would necessarily have affected the inferences they were to draw from the conduct of Lilienthal, viz: the fact as to the legality or illegality of the returns made by him in the course of this transaction.

4.

In the second place, the transaction in regard to the "Orinoco tobacco" was not "*an utterly illegal transaction*," as asserted by the court below. It was no evasion of any existing law; and to say that it was an evasion of the revenue laws, because it was done in anticipation of a future law, is simply absurd. There cannot be, under our system of jurisprudence, a present fraud upon a future law. Or, if anticipation of intended or possible future legislation is a fraud upon the revenue, then we have the most infamous system of revenue laws ever devised.

Apart from the fact that, in respect to this very tobacco on hand, Lilienthal consulted those upon whose advice and authority he had the right to rely, (Record, p. 14,) and that, as far as regards fraudulent intent, the only positive testimony in the case on that point, flatly contradicts the inference of fraud, it was evidently both the intention of Congress and the right of the manufacturer to return for taxation before the 1st of April, 1865, at the then existing rate, all the manufactured article then on hand.

The 16th section of this very act of March 3, 1865, (13 Stat., 486,) which was to go into effect on April 1, 1865, provided: "That no duty imposed by any previous act, "*which has become due or of which return has been or ought to be* "*made*, shall be remitted or released by this act, but the "same shall be collected and paid, * * * as if this act "had not been passed." And the 70th section of the act of July 13, 1866, (14 Stat., 173,) enacts, "that all manu- "factures and productions on which a duty was imposed "by either of the acts repealed by this act, (those of 1864 "and 1865, hereinbefore mentioned,) which shall be in the "possession of the manufacturer or producer, or of his "agent or agents, on the day when this act takes effect, *the* "*duty imposed by any such former act not having been paid*, "shall be held and deemed to have been manufactured or "produced after such date." If the reasoning of the court below that there was no duty *imposed* on any article before sale or removal, and that the manufacturer had no right to return any article for taxation until actual sale or removal, be correct, then these sections have no meaning. The act of 1865 plainly contemplates that a return may be made when the tax imposed has not actually become fully due by a sale or removal of the property. And in reference to the act of 1866, it is impossible to understand how a duty imposed could have been paid, and yet the article manufactured remain in the manufacturer's hands, unless he was allowed to waive the act of sale and return it for taxation at his pleasure at any time before actual sale or removal. This is the only rational explanation of the acts of Congress.

Again, wherever a duty is imposed contingent entirely

upon the act of the party, such as the act of sale or removal, there can be no question but that the party may waive the arrival of the contingency, and anticipate the payment of the duty.

The purpose of the act is to raise revenue, not for any particular period of time, but generally, and in execution of this purpose it imposes specific burdens upon certain designated articles; if the amount imposed upon any particular article is *paid* the Government cannot complain, for the reason that as to that article the purpose of the act is accomplished and its requirements complied with.

The Court in its charge to the jury on this point said :— "The district attorney has called your attention *very properly* to the fact that the law in all its provisions aims at this: *That manufacturers of tobacco shall not be allowed to aggregate in their establishments large quantities of tax-paid goods.*"

It is submitted that this was an entire misconception of the aims of the law and the purposes of that particular provision designating the contingencies upon which the tax imposed should accrue.

The language of the acts of 1864 and 1865, is as follows: "That upon the articles, goods, wares, and merchandise hereinafter mentioned, except where otherwise provided, which shall be produced and sold &c." It is manifest that the contingencies herein specified as those upon the happening of which the tax should be paid upon the articles referred were intended to protect the manufacturer, and not to prevent an aggregation in his establishment of tax-paid goods.

The liability to tax accrued when the article was *manufactured and sold*, and the reason for the second contingency was to save the manufacturer from the possible losses he

might sustain if required to pay the tax on the article when manufactured and before sale; for he might manufacture a greatly larger stock of goods that he could dispose of. It would have been much to the advantage of the Government to have required payment of the tax immediately upon manufacture, but this would have been unjust to the manufacturer, and therefore it was provided that he should be compelled to pay only after sale.

This second contingency of sale, therefore, for his benefit he could certainly waive at any time, and pay the tax when the article had been manufactured and was ready for sale.

This view is confirmed by the legislative construction given to the acts of 1864 and 1865, by sec. 70 of the act of 1866, above referred to and quoted.

It was under these acts of 1864 and 1865 that the Oronoco tobacco transaction took place.

The act of 1866, sec. 9, p. 125, 14th Stat., inserted in the system a new process in regard to the payment of taxes on manufactured articles, not contained in any of the preceding acts. With this act, however, we have nothing to do in considering this particular question.

5.

The fourth alleged act of fraud, the removal of a large quantity of tobacco by Mr. Lilienthal from his wholesale to his retail department, and the return of it for taxation at the time of removal, so far from being a fraud upon the revenue was really calculated to benefit the revenue, and could injure no one but the manufacturer himself. The al-

ternative was that he should make a return of every pound of tobacco as he sold it by retail. The Government certainly was more likely to get all its proper revenue in the former than in the latter way. Moreover, the remarks made in regard to the "Orinoco tobacco," as to the right of waiver on the part of the manufacturer, are also applicable to this transaction.

The fact that Mr. Lilienthal kept no account of manufactures separate and distinct from his account of sales was given to the jury as a fraudulent act. It is shown to have been utterly impracticable to keep such an account; (see testimony of Dennerker, Record, p. 15;) and it does not appear that there is any provision of law requiring the keeping of such an account.

While it is stated that Lilienthal sold and removed from his premises quantities of tobacco not of his own manufacture, but purchased by him, of which no proper account was kept in his books, we have no record of the evidence on that point; and there is no pretence that there was any evidence that the full amount of tax on said tobacco had not been paid, or that the Government lost any revenue thereby. It is not a fact, in any event, from which a fraudulent intent could be inferred.

The alleged discrepancy between Lilienthal's annual inventories and the aggregate of his monthly returns, which is the sixth fraudulent fact relied on by the prosecution, is reasonably and satisfactorily explained in the testimony of Dennerker. (Record, pp. 20, 21.)

Such is the testimony in the case. There is nothing whatever in it to justify a verdict against the claimant; and the court below should have at once directed the jury to find a verdict in his favor, in accordance with the fourteenth prayer asked on his behalf.

If any one of these acts given in evidence was a proper and legal act then it was error in the court below to have permitted evidence of it to go to the jury.

It was error in the court to refuse to tell the jury whether they were legal or illegal.

Much more was it error to charge, as the court did, that an act was illegal when in fact it was legal.

It is claimed that the charge was, in fact, favorable to Lilienthal, because the jury were instructed that, even if the acts complained of were in themselves illegal, the jury must be satisfied, in addition to this, that they were done with a fraudulent intent before it could find a verdict for the Government. But, beyond the acts themselves, there was no proof of fraudulent intent; and to tell the jury that it must be satisfied that there was intentional fraud, as well as illegality, was either superfluous, because there was no independent testimony to support the charge of fraud, or it was a mere mockery, inasmuch as the presumption of fraud was already directed against him in the instructions asked and granted on behalf of the Government.

If this position be correct the judgment must be reversed. This Court has laid down as law that "While it is a sound

"principle that no judgment should be reversed on error, "when the error complained of worked no injustice to the "party against whom the ruling was made, it must appear "so clear as to be beyond doubt that the error did not and "could not have prejudiced the right of the party. The "case must be such that this Court is not called on to decide "upon the preponderence of evidence that the verdict was "right, notwithstanding the error complained of."

Smiths *vs.* Shoemaker, 17 Wallace, 630, 639.

Deery *vs.* Cray, 5 Wallace, 795.

Each particular transaction submitted to the jury was accompanied by such *intimations of inferences* and presumptions that, independent of the rule above referred to, it is manifest they must, one and all, have operated to the prejudice of the claimant.

B.

It is quite possible that, if the decision in the case of Chaffee *vs.* The United States (18 Wallace, 516) had been rendered before the trial of this case in the court below, the judgment of that court, as well as its instructions to the jury, would have been very different, for that case is conclusive as to the error in the rulings of the lower court.

The suit against Chaffee was founded upon the same 48th section of the internal revenue act of June 30, 1864, upon which the prosecution against Lilienthal is founded, though there the proceeding was under the second paragraph of the section to enforce the penalty of five hundred dollars.

The gist of the proceeding in both cases is, however, the same—the alleged fraudulent intent of the party proceeded against. The first instruction asked and granted on behalf of the prosecution in Lilienthal's case is almost identical with that granted by the court in Chaffee's case, on account of which this Court promptly and pointedly and unanimously reversed the judgment in the lower court; and if that decision is to remain the law, which we cannot doubt, the present case must share the same fate.

It was there decided, that it is error to instruct a jury, in an action for penalties for alleged frauds upon the revenue, that after the Government has made out a *prima facie* case against the defendants, if the jury believe the defendants have it in their power to explain the matter appearing against them and do not do so, all doubt arising upon such *prima facie* case must be resolved against them. On the contrary, the burden rests upon the Government throughout the entire trial *to make out its case beyond a reasonable doubt.*

We quote in part the language of the Court: "The pur-
"port of all this was to tell the jury that, although the de-
"fendants must be proved guilty beyond a reasonable
"doubt, yet if the Government has made out a *prima facie*
"case against them, not one free from all doubt, but one
"which disclosed circumstances requiring explanation, and
"the defendants did not explain, the perplexing question of
"their guilt need not disturb the minds of the jurors; their
"silence supplied, in the presumptions of law, that full proof
"which should dispel all reasonable doubt. In other words,
"the court instructed the jury, in substance, that the Gov-
"ernment need only prove that the defendants were pre-

"sumptively guilty, and the duty thereupon devolved upon "them to establish their innocence; and if they did not, "they were guilty beyond a reasonable doubt. We do not "think it at all necessary to go into any argument to show "the error of this instruction. The error is palpable on its "statement. All the authorities condemn it. The case of "Clifton *vs.* The United States, in 4 Howard, cited by the "court below, was decided upon a statute which cast the "burden of proof upon the claimant in seizure cases, after "probable cause was shown for the prosecution, and there- "fore has no application. The instruction sets at naught "established principles, and justifies the criticism of coun- "sel that it substantially withdrew from the defendants "their constitutional right of trial by jury."

Chaffee *vs.* United States, 18 Wallace, 545.

The same doctrine is laid down in the case of The United States *vs.* The Brig Burdett (6 Peters, 682:) "That frauds "are frequently practised under the revenue laws can not "be doubted; and that individuals who practice these frauds "are exceedingly ingenious in resorting to various subter- "fuges to avoid detection, is equally notorious. But such "acts cannot alter the established rules of evidence which "have been adopted as well with reference to the protection "of the innocent as the punishment of the guilty. A view "of the evidence in this case must create a suspicion of "fraud in the mind of every one who reads it with atten- "tion. * * * If a fair construction of the acts and "declarations of an individual do not convict him of an "offense, if the facts may be all admitted as proved, and

"the accused be innocent, should he be held guilty of an "act which subjects him to the forfeiture of his property *on* "*mere presumption?* He may be guilty; but he may be in- "nocent. If the scale of evidence does not preponderate "against him, if it hangs upon a balance, the penalty should "not be enforced. No individual should be punished for a "violation of law which inflicts a forfeiture of property, "unless the offense shall be established beyond reasonable "doubt. This is the rule which governs a jury in all crim- "inal prosecutions; and the rule is no less proper for the "government of the court when exercising a maritime jur- "isdiction."

United States *vs.* Brig Burdett, 6 Peters, 682.

The present case is even more obnoxious to criticism than Chaffee's. It does not appear here, as in that case, that the defendant refused to produce evidence which he might easily have produced; and the inference which the jury was instructed to make is much more remote. It was told that a fraudulent intent might be inferred from certain specified acts not connected with this litigation in any way; and unless the defendant gave satisfactory explanations of the same, then that from this inference the *further inference* might be deduced of a fraudulent intent in respect to the goods seized in this suit.

But no change in the language of the court can make the error more apparent or the rule laid down more unjust than they appear in the charge itself.

After enumerating certain acts of Lilienthal, of a date prior to the transaction in question, the court says, upon the

hypothesis that the jury shall find such acts, "then the *burden* of proof is upon the claimant to *satisfy* the jury that the tobacco so manufactured on said premises and sold or removed without due account, return and entry made thereof in said books and abstracts in the manner required by law, was *not* so sold and removed in fraud of the internal revenue laws and with intent to evade the taxes thereon; and if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent, and *that his possession of the goods in suit was with the like intent.*"

If the mere statement of the instruction in Chaffee's case demonstrated its absurdity, the Court will not be at a loss to characterize the instruction given in this case.

"To take presumptions," said Lord Stowell, in Evans *vs.* Evans, 8 Hagg, "to swell an equivocal and ambiguous fact into a *criminal fact*, would, I take it, be an entire misapplication of the doctrine of presumptions."

C.

But are the antecedent acts of the claimant, set out in the record, admissible at all in this cause?

The offence attempted to be created by the statute, upon which this proceeding is founded, is the intention of the party, the undeveloped *intention* that has never assumed substantial and appreciable form in *action*.

It is said in Castle *vs.* Bullard, (23 Howard, 186,) "that "*other wrongful acts* of the defendant are admissible in evi- "dence on the trial of the particular charge immediately "involved in the issue. Similar fraudulent *acts* are admis-

"sible in cases of this description if committed at or about "the same time, and when the same motive may reasona- "bly be supposed to exist, with a view to *establish the intent* "*of the defendant with respect to the matters charged against him* "*in the declaration.*"

This exception to the general rule of evidence contemplates the existence of a charge against the defendant of some *act* done by him which is fraudulent in its character or may be so, and of which *act guilty knowledge or intention* constitutes an essential element. Under such circumstances similar fraudulent *acts* are admitted to go to the jury to assist in determining the intention and motive with which the act in question was committed. But there must be some act done by the party charged, and proof of the act must be given to the jury, in order to justify evidence of other acts which is only designed when given to establish *motive.*

The general rule is conceded to be that other offences of the accused are not competent evidence to establish the main charge, and the exception is strictly limited, as stated above.

Cary *vs.* Hotailing, 1 Hill, 316.

In this case there was no act whatever charged against the claimant, and the transactions that took place prior to the seizure were offered in evidence to establish the *main charge*, viz: the *intention* of the party, and not to show *intention* as an ingredient of some *overt act.* Not only was no act ~~adjudged~~ charged against the party, but none was attempted to be proved. On the contrary, as stated by the judge in his

charge to the jury, "*the testimony is entirely testimony in regard to what are alleged to have been previous acts of omissions and commissions of Mr. Lilienthal and the persons in his establishment.*"

Record, p. 25, line 50.

There was no proof that the claimant was engaged in any new undertaking, ~~and~~ or that he was conducting the undertaking in which he was engaged in any new or exceptional manner. The proof in this regard was, as stated in the bill of exceptions, (Record, p. 6,) "that the claimant was a manufacturer and seller of tobacco in the city of New York *at and for a long time prior* to the seizure in the information set forth."

To punish mere intent, unaccompanied by any overt act, is certainly contrary to natural justice. The common law of England in its most barbarous days never attempted anything of the kind, except in the single case of treason, and that for peculiar reasons, which we have utterly repudiated in our organic law. We cannot suppose that this Court will give effect to a legislative enactment which assumes to regard *intention* as *in itself* a civil crime, without the clearest and most unequivocal proof of guilt, and without the fullest demonstration that such an enactment is in harmony with the Constitution. Nor can we believe that for the purpose of enforcing against a party so harsh and unreasonable a statutory provision, the Court will consent to declare a new and additional exception to the well recognized and long established rules of evidence.

D.

The fourth amendment to the Constitution of the United States provides that: "The right of the people to be secure "in their persons, houses, papers, and effects against unrea- "sonable searches and seizures, shall not be violated; and no "warrants shall issue, but upon probable cause, supported "by oath or affirmation, and particularly describing the "place to be searched, and the persons or things to be "seized."

It is perfectly clear that this clause of the Constitution prohibits all searches and seizures, except upon warrant, supported by affidavit showing probable cause, and describing the property to be seized. It would seem to be equally clear that any legislative enactment which would provide for seizures to be made without any such preliminary affidavit, would be in contravention of this constitutional inhibition. The revenue act of March 2, 1799, (1 Statutes, 627–704,) regulating the collection of duties on imports, the provisions of which have been continued in force to the present day, sedulously conformed to the constitutional requirement, and provided that the seizures authorized by it should be made only upon warrant, supported by affidavit. (See section 68, p. 677.) The internal revenue acts of 1864, 1865, and 1866, are remarkable for the absence of any such respect for the constitutional safeguards, as was manifested in the acts of our early legislators.

R. T. Merrick,
M. F. Morris,
For Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHRISTIAN H. LILIENTHAL, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
No. 137.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Brief for the United States.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

CHRISTIAN H. LILIENTHAL, plaintiff in error, *vs.* THE UNITED STATES. } No. 137.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

March 27, 1868, the United States district attorney filed an information, in the proper court, against the property in controversy in this suit, alleging its seizure, upon the 25th day of that month, by the collector of internal revenue of the district, for a forfeiture incurred under the laws of the United States, by reason of its having been kept for the purpose of being sold and removed by the custodian in fraud of the internal-revenue laws and with design to avoid payment of the internal-revenue taxes thereon, contrary to the forty-eighth section of the act of June 30, 1864, c. 173, entitled, &c., as

amended by the act of July 13, 1866, c. 173. It was further said that the raw materials seized were designed to be made up into a taxable article, to be removed in fraud of the law and without payment of the taxes, and that the tools, implements, &c., were to be used in their manufacture. (Record, 3, 4.)

At the trial evidence was given tending to show that the property in question was in the possession of the claimant at the time of its seizure; that the manufactured tobacco was subject to tax, and the raw materials were to be made into a taxable article; "*and that the claimant, at the time of the seizure, had in his possession the manufactured tobacco and raw materials so seized for the purpose of selling and removing the said manufactured tobacco in fraud of the internal-revenue laws, and with design to avoid payment of said taxes*, and of manufacturing the said raw *materials into articles of a kind so subject to tax, for the purpose of fraudulently selling such manufactured articles and with design to evade the payment of said tax* (Record 4, folio 15, middle); and with a view to prove that the same were liable to seizure and forfeiture, and were forfeited under the forty-eighth section of the internal-revenue act of June 30, 1864, the district attorney gave evidence tending to show the following acts and omissions of the claimant prior to the seizure aforesaid" (*Ib.*), which were said by the district attorney to be acts or omissions in fraud and violation of the internal-revenue laws, from which the jury might infer the claimant's intent to sell or remove the tobacco, manufactured and to be manufactured, for the purpose and with the design aforesaid (*Ib.*). Evidence was introduced "tending to prove" that Mr. Lilienthal, after August 1, 1866, to January, 1868, manufactured

and sold, in each month, large quantities of a kind of tobacco on which he had previously paid a tax of 35 cents a pound, but which, after August 1, 1866, he returned as liable to, and paid thereon, a tax of 15 cents a pound only, "*while he knew and believed that said tobacco was subject to a tax of* 40 *cents a pound by the said act*" of July 13, 1866. (Record, 7.) Claimant's seventeen monthly returns to the assessor, duly verified, from August, 1866, to December, 1867, both inclusive, were put in as corroborative of this. Upon each of them it appeared that the claimant had returned tobacco as made, sold, and removed by him under the designation of "smoking-tobacco, not sweetened, stemmed, or butted, including that made of stems," subject to a tax of 15 cents a pound, which tax only he paid. It was proved that, prior to August 1, 1866, this tobacco was advertised and sold as "extra long smoking-tobacco," and was made "by putting in the cutting-machines in certain proportions what are called 'fillers' and pieces of stem about an inch and a half long, and cutting them, under heavy pressure, into fine shreds." These "fillers" were tobacco-leaves from which the stems had been removed by "butting" or "stripping," which is "to take a tobacco-leaf entire and, after 'casing' (*i. e.*, wetting) it, to remove, by cutting and drawing out from it, one-half to three-fourths in length of the woody central stem that runs through the leaf from end to end, the object being to leave as much of such stem in the leaf at the top of it as would not be noticeable in the product after cutting." The pieces of stem put with the fillers into the cutting-machines had previously, and after their removal from the leaf, been "passed between heavy rollers, by which they are broken up into pieces, which are then

'cased' or soaked in a certain dye-stuff, to assimilate their color to that of the pure leaf, but no sweetening is used; after which they are again crushed between the rollers, coming out in pieces about an inch and a half long. This product is dried on screens, and there lies in a heap until wanted for use in the cutting-machines. After passing with the fillers through the cutting-machines the product goes to the dressers, who shake the fibers apart, and it is spread out on screens or driers to dry. When fully prepared, it is put up for sale in packages of paper or foil, and is also largely sold loose in bulk.

Large quantities of this tobacco were sold in each of the seventeen months from August, 1866, to December, 1867, both inclusive.

The witness further testified that the manufacture of tobacco, substantially as above described, had been carried on in claimant's factory for several years prior to said seizure, the only difference being that prior to about August 20, 1866, the proportion of the crushed stem to the fillers put in the cutting-machines was about twenty pounds of such crushed stem in each machine-box containing ninety pounds of fillers and crushed stem, while, after said date, the average fillers to crushed stems in such machine-box was two pounds of fillers to one pound of crushed stem; and that it having been ascertained by experiment that the average proportion, by weight, of the butts or portions of stem extracted from the leaf for making this extra-long smoking-tobacco, was one-fourth of the weight of the entire leaf, it was intended, in the manufacture of such tobacco, after August 20, 1866, to cut up with a given weight of the fillers, at least as much of crushed stem as would equal in weight

the average quantity of the stems taken out of such fillers.

The result of the process was that when the tobacco was finished for sale, the stem which it contained was not distinguishable from the leaf.

The witness further testified that, prior to August, 1866, the said tobacco had, for some portion of the time, been designated and sold as "extra-long smoking and chewing tobacco," and had been entered by the claimant in the monthly returns of sales and removals of manufactured tobacco prior to such date made by him to the assessor for taxation under the classification upon such returns as "smoking-tobacco," and as subject under the existing law to taxation at the rate of 35 cents per pound.

That upon the monthly returns made for August, 1866, of sales and removals of manufactured tobacco during that month, the extra-long smoking-tobacco sold, or removed for sale, manufactured prior to August 20, 1866, and containing a somewhat smaller proportion of said crushed stem, was entered upon the said returns as "chewing-tobacco" under the classification in said return of "fine-cut chewing," and as subject, by said act of July 13, 1866, to a tax of 40 cents per pound, and was entered by a like designation in the book hereinafter referred to, marked Exhibit 138 A; that upon said seventeen returns of said sales and removals, the extra-long smoking-tobacco sold or removed for sale, manufactured after August 20, 1866, containing the larger proportion of crushed stem aforesaid, was entered upon the said returns as smoking-tobacco, under the classification in said returns of "smoking-tobacco not sweetened, stemmed, or butted, including that made of

stems," and as subject, by said act of July 13, 1866, to a tax of 15 cents per pound.

The witness further testified that leaf-tobacco is "stemmed," in the understanding of tobacco manufacturers, when the whole of the central stem has been removed from the leaf, and that it is "butted" when the thick end or lower portion of said stem is cut and drawn out of the leaf, leaving more or less of the upper part of the stem still in the leaf, and that it was not practicable, in the process described by him by which the said extra-long smoking-tobacco was manufactured, to restore to or replace with any particular leaf or quantity of leaves the identical portion or portions of stem that had been extracted therefrom.

It also appeared from an examination of the complainant's books of accounts, in evidence, that the extra-long smoking-tobacco manufactured prior to August 20, 1866, and returned as "fine-cut chewing" tobacco, subject to a tax of 40 cents per pound, was sold by the claimant to his customers for 70 cents per pound, and that said tobacco, manufactured after said date and returned under the classification of smoking-tobacco not sweetened, stemmed, or butted, including that made of stem, subject to a tax of 15 cents per pound, was sold by the claimant to his customers for 60 cents per pound. (Record, 9–11.)

Certain correspondence between the Commissioner of Internal Revenue and the assessor was introduced by the claimant, but as it was never communicated to him till after the seizure, it could not have affected his acts or intention, and no question is perceived to arise upon it. It is therefore omitted.

"And the said United States attorney further gave

evidence tending to prove that in the months of April and May, 1867, a large quantity in each month of tobacco manufactured in said factory of the claimant had been removed therefrom for sale, and had not been returned for taxation upon the claimant's return for such months, and had never been lawfully returned for taxation, and that the lawful tax upon the same had never been paid, but that the claimant had, in fraud of the internal-revenue laws, and with design to avoid the payment of an anticipated increase in the rate of tax on the said tobacco, in the month of April, 1865, made a certain pretended return for the taxation of the said and certain other tobacco, as sold in March, 1865, in his return for that month, and as liable to taxation, when the said claimant knew the same had not been sold and was not returnable for taxation, and that the claimant kept the said tobacco in his said factory and sold and removed the same after April 1, 1865, and during said period of seventeen months, without in any manner returning the same for taxation or paying any tax thereon.

The said attorney introduced evidence tending to show that, in the month of April, 1867, the claimant sent out of his factory to one Coleman, in California, for sale, a consignment of 3,600 pounds of manufactured tobacco, of a description manufactured with all the stem in, the leaf not having been butted nor stripped from the stem, and not having been sweetened and sold by him as smoking-tobacco, under the designation of "pressed Orinoco tobacco"; and in the month of May, 1867, a like consignment of 3,400 pounds of said tobacco; that the said quantities of said tobacco so removed for sale were not returned for taxation by the claimant in his monthly returns to the assessor of manufactured tobacco

sold or removed for sale for the said months of April and May, 1867, and were never so returned except in the manner following:

The said witness, C. W. Dennerker, testified that the 7,000 pounds of the said Orinoco tobacco, included in the said consignments, had been stored in the lofts of the said factory from a period prior to March, 1865, until sent out to California as aforesaid, and had never been out of the factory in that time. That upon the claimant's monthly return for March, 1865, of sales and removals of manufactured tobacco during said month, he made return of the 7,000 pounds with other tobacco of the same kind and of other kinds to a large amount, as sold during said month; that under date of March 31, 1865, there appeared, in a book kept by witness of sales and removals, from which the claimant's book-account of sales and removals for taxation was made up, an entry of 9,000 (pound) boxes of "Orinoco," and a like entry of 3,800 boxes of the said tobacco, and witness believed the said 7,000 pounds, consigned as aforesaid, formed part of the quantities so entered on his book, and which were included in the monthly return of the claimant for said month of March, 1865. That the said quantities of Orinoco so entered by witness in his said book, which he called the "tax-book," under date of March 31, 1865, were identical with the like quantities which appeared on the claimant's book of sales (in evidence) with other quantities of manufactured tobacco of different kinds, amounting to about $60,000 worth, entered under date of March 8, 1865, as sold to Messrs. Kearney & Waterman, of New York, dealers, on commission, in paper. That a bill of said goods was made out to said Kearney & Waterman, but

they were never delivered to them, and said 7,000 pounds of Orinoco never left the factory until shipped to California. That the claimant and said Kearney & Waterman severally exchanged their checks for the amount appearing on said sales-book as the price of said goods. It also appeared in evidence that the Orinoco tobacco returned for taxation upon the return for March, 1865, was returned under the classification of manufactured tobacco, subject by the internal-revenue act of July 30, 1864, to a tax of 25 cents per pound, and that the tax thereon at that rate was paid by the claimant; and that other quantities of manufactured tobacco and snuff, included in the said alleged sale, were removed from said factory during said period of seventeen months, without any entry or return of the same for taxation required by law, or the payment of any tax thereon other than as aforesaid; and that no account of the removal for sale of said 7,000 pounds of Orinoco tobacco, and said other quantities of manufactured tobacco and snuff, was kept in book-form as required by law, and no entries of such removals were made in the book in evidence, marked Exhibits Nos. 138 and 138 A, hereinafter mentioned.

The said United States attorney afterwards called as a witness the claimant C. H. Lilienthal, and producing before the witness his sales-book in evidence, and calling the attention of the witness to the said entry therein under date of March 8, 1865, as of a sale to Kearney & Waterman of the said 9,000 and 3,800 pounds of Orinoco, with other tobacco, concerning which the witness Dennerker had testified as aforesaid, asked the witness whether on or about the 8th day of March, 1865, he made a sale of the 9,000 and 3,800 pounds Orinoco

tobacco, so entered, to the said Kearney & Waterman. The counsel for the claimant objected to the question, on the ground that its only object was to show that the sale in question was a fictitious sale; and that such evidence was immaterial, as it appeared that a tax of twenty-five cents per pound had been paid on such tobacco under the act of June 30, 1864. But the court ruled that the question was proper and the evidence admissible. The claimant's counsel excepted to such ruling, and the exception was noted and allowed; and the said witness, in answer to such question, testified that he sold to said Kearney & Waterman the bill of goods, including the said quantities of Orinoco tobacco, so entered in the sales-book as aforesaid; that the said goods were never delivered to said Kearney & Waterman, and were never intended to be delivered to them; nor were they removed from said factory; that it was understood between him and said Kearney & Waterman that the goods were sold and bought back; and he believed, though he was not positive about it, that he exchanged checks with them for the amount of the bill; that this proceeding was for the purpose of returning the said goods as sold in his monthly return for taxation for the month of March, 1865, in order to avoid the payment of an increased rate of taxation which said goods would be liable to, under the act of March 3, 1865, which was to take effect on April 1, 1865.

Upon cross-examination by his counsel the witness testified that prior to said transaction with Kearney & Waterman, he consulted with Senators Fenton, Morrill, Fessenden, and other members of the Senate Committee on Finance, and with several members of the House Committee of Ways and Means, as to whether, in re-

spect of goods on hand, when the said act of March 3, 1865, should go into effect, he would have a right to return the same for taxation, under the act of June 30, 1864; and that he was advised by them, and by Senator Morrill especially, that he would have such right; that he had no purpose to defraud the government, but considered that such a transaction warranted him in returning the goods as sold; that all this tobacco was included in and entered upon his monthly return to the assessor for the month of March, 1865, and a tax subsequently paid thereon, according to the rates prescribed by the act of June 30, 1864.

The said United States attorney further gave evidence tending to prove that the claimant, during the said period, from August 1, 1866, to January 1, 1868, did neglect and refuse to keep in book-form an account of each of the different kinds of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems purchased by him during said period, and of the quantity of tobacco, snuff, snuff-flour, and cigars of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from the place of manufacture during said period, as required by law.

And the said attorney put in evidence two certain books of account of the claimant, marked by the court as Exhibits No. 138 and No. 138 A, and proved that the same were kept during the said period by one Senica S. Davis, in the employ of the claimant as superintendent of his said factory, and specially charged with keeping the said books and making the said returns for taxation, and that said books were the only books kept, as and for the accurate account, in book-form, of the different kinds of tobacco, &c., purchased

manufactured, sold, or removed by the claimant during said period, as required by law. The book No. 138 A, contained the entries for the month of August, 1866, and some succeeding months in 1866. The book No. 138 contained the entries for the remaining months of said period. The entries for each month in said books were kept on a separate page or pages thereof, under a general heading, which in No. 138 was in writing, and read thus: "Account of tobacco and snuff sold by C. H. Lilienthal in the year 1867." No. 138 A was in print and read thus: "Quantity of tobacco and snuff sold and consumed and removed for sale or consumption from the factory." Otherwise the entries in said books were in writing. Under said headings was a line for each week-day of the month, on which were entered under the descriptions of "chewing," "smoking," "stems," "pure shorts," and "snuff," certain quantities of each of the said articles or kinds of tobacco.

It appeared in evidence that the quantities so entered by said Davis were obtained from four books kept by the foreman, Dennerker, which purported to contain a record of quantities of tobacco subject to tax sold at said factory.

There was evidence tending to show that a portion of the entries in said Dennerker's book were made by him immediately after the sale and shipment from the factory of the quantities of manufactured tobacco so entered, and that the residue of said entries represented certain quantities of such tobacco which had not been either sold or removed from the factory at the time of making such entries, but which had, on the day or the day before they were so entered, been taken, usually in considerable masses, from some part of said factory to a

part thereof on the lower floor, called the retail-counter, (hereinafter more particularly described), to be from time to time thereafter retailed therefrom in small quantities to purchasers; and that of such retail-sales during said period no record was kept other than a memorandum of the cash received, and no account of such sales was kept by said Dennerker in his books, nor by said Davis in the said books kept by him.

There was no account in either of said books No. 138, and No. 138 A, during said period, of any quantity of tobacco, snuff, snuff-flour, or cigars of any description manufactured in said factory during said period, though there was evidence tending to show that large quantities of tobacco and snuff had been manufactured therein in each month of said period, and that the attention of the claimant had been called by the assessor to the requirements of the law in respect to keeping such account of the tobacco and snuff so manufactured." (Record, 12, 15.)

The bill of exceptions then recites evidence adduced by claimant, which he considered as tending to show that from the mode of conducting his business it was impracticable to comply with the law; but this is so obviously no excuse for its violation that the testimony is not copied into this brief. (Record, 15, 16.)

"There was evidence tending to show that *quantities of tobacco had been bought, manufactured, sold, and removed from the factory during this period, of which no account had been kept in said books.*" (Record, 16, middle.)

No distinct account of goods manufactured was kept; but all the tobacco entered as manufactured in the several months of 1867, was also entered as sold during

those months; that is, only goods actually sold were entered as manufactured, monthly. (*Ib.*, folio 34.)

The United States attorney also produced evidence tending to prove that during said period, or a portion of it, the claimant *failed to make true returns of the purchases, products, sales, delivery, and removal of tobacco* at his manufactory. (*Ib.*)

The United States attorney put in the inventories sworn to by Mr. Lilienthal, and by him returned to the United States assessor, stating the quantities of different kinds of tobacco, snuff, cigars, tin-foil, licorice, stems, &c., held and owned by claimant on the first days of January, 1867 and 1868. All purchases, sales, and removals of tobacco and other articles made during the year 1867, were professedly stated in the monthly sworn returns of that year, numbered 1 to 17, as aforesaid; and, as before said, the purchases just equaled the sales and removals, so that, if it could be believed that these sworn statements were correct, there would obviously be the same amount of tobacco, stock, &c., on hand at the beginning of 1868 that there was at the commencement of 1867, whereas there were great discrepancies in the quantities of articles as enumerated in the two inventories. For instance, though by his monthly sworn returns, the remarkable fact appeared that Mr. Lilienthal had sold every pound of chewing-tobacco which he made in 1867, he still swore to having 5,456 pounds more on hand January 1, 1868, than he swore he had January 1, 1867, as is shown by comparing the inventories; and he had 11,804 more pounds of fine-cut shorts, though he swore each month in 1867 that he sold all he made. Of cut smoking-tobacco, after selling his whole monthly product each month, *and no*

more, he stated by these inventories that he had 16,975 pounds *less* at the close of the year than at its beginning, so that this quantity was never returned for taxation. (Record, 16 to 20.)

"The said United States attorney further gave evidence tending to prove that during the said period, from August 1, 1866, to January 1, 1868, large quantities of manufactured tobacco, and particularly of a kind of tobacco known as granulated tobacco, or Killikinick, were sold and removed from the said factory by the claimant, without the due return thereof for taxation and payment of the taxes thereon as required by law.

And the said attorney put in evidence certain books of account of the claimant, marked by the court as Exhibits No. 90 and No. 91, and which were proven to be the books of account kept during the said period in the said factory by the claimant's book-keepers for him, and to contain the original daily entries of orders from the claimant's customers for the different kinds of tobacco and snuff manufactured and sold, or sold by the claimant, and other memoranda, showing the fillings and shipment of the goods as ordered of the claimant, marked by the court as Exhibits ——, and proven to have been kept during said period; also, certain books of account kept by C. W. Dennerker, as foreman of the claimant, and having charge of the shipment of all goods so ordered as aforesaid, and called by him the "tax-books," in which he testified he was accustomed to enter from day to day the quantities of tobacco and snuff manufactured in said factory which were sold upon order and shipped to customers; and also certain quantities of manufactured tobacco taken from the lofts and other parts of said factory to a part thereof on the lower

floor, known as the retail-counter, where the said quantities were thereafter sold from time to time, at retail, to customers.

It appeared tha tthe substance of the entries in these books was transferred by the said Davis to the said books 138, 138 A, kept by him, and that they were the materials from which he made up his account of manufactured goods of the claimant, sold or removed, as it appeared in said book and in the returns for taxation in evidence.

It appeared in evidence, as to the said retail-counter, that on the first floor of the factory a wooden partition, not extending to the ceiling, and but about six feet in height, divided the floor into two compartments, but with means of intercommunication, of which one was used as a packing-room and the other as a store or sales-room, in which were placed cases and packages of the different kinds of tobacco manufactured by the claimant, for exhibition and sale; that in front of the said partition was a counter, which was called, as aforesaid, the retail-counter, and that back of such counter and against the partition were shelves, on which were placed the goods to be sold.

Large quantities of the different kinds of tobacco manufactured by the claimant were sold at this counter during said period, by retail, in small lots, to customers, and no record or memorandum whatever was kept of such sales except an entry by the cashier of the cash received by him from each customer.

There was evidence tending to show that when supplies of goods to be sold at said retail-counter were needed, a requisition was made on the person in charge of the packing or other room for a quantity of any par-

ticular kind of goods, which was furnished, and a memorandum of the kind and quantity was made on a slip of paper, and that such memoranda were thereafter transferred by said Dennerker to the "tax-books" aforesaid.

It further appeared in evidence that in each month of said period there were entries in the said order-book of quantities of the kind of tobacco manufactured by the claimant, known as granulated tobacco, or "Killikinick," which had been sold and shipped from said factory, and which quantities did not appear in the said tax-books in specific items corresponding in quantity. There also appeared in said tax-books quantities of granulated tobacco not corresponding in quantity with any specific items of sales and shipments on said order-books.

The foreman, Dennerker, testified that it was the custom to send granulated tobacco in large masses to the retail-counter, and that any particular quantity of granulated tobacco found on the order-books as shipped, and not entered as a specific item of like quantity in his tax-books, was probably filled out of the stock at the retail-counter, and it was taken from some of said masses previously sent to said counter; and that it was his practice to enter the said masses in his tax-books when they were sent to said counter." (Record, 20, 21.)

"And thereupon, and before the presiding judge proceeded to charge the jury. The counsel for the claimant submitted to the court the following prayers for instructions to be given to the jury, viz:

The court is requested to charge the jury in behalf of the claimant:

I. That if the jury shall believe that the returns for

taxation of the tobacco known as extra-long smoking-tobacco, between August, 1866, and the date of seizure, were made in good faith and with an honest belief on the part of Mr. Lilienthal and his agents concerned or employed in the preparation of said returns, that said tobacco was liable to the fifteen cents rate of duty, and to no other or higher rule, then, even though said tobacco was by law liable to the forty cents rate of duty, the jury cannot, for that cause, find a verdict for the government under section 48.

II. That, in order to forfeit the property proceeded against in this action, or any part thereof, the jury must be satisfied, either, first, that at the time of the finding thereof, the manufactured articles, or some of them, were held by the persons in whose possession they then were, with a purpose then existing of selling or removing the same in fraud of the internal-revenue laws, or with design then existing to avoid payment of the taxes imposed thereon; or, second, that the persons in whose possession the raw materials were found held them at the very time of such finding, with intent to manufacture the same into articles of a kind subject to tax, for the purpose of fraudulently selling such manufactured articles, or with design to evade the payment of said tax.

III. That fraudulent intent and fraudulent acts long prior to the time of the finding and seizure of the property in this action (if any such existed) cannot warrant a verdict of condemnation, unless accompanied or supported by evidence of fraudulent intent or fraudulent acts at a period nearly coincident with the time of seizure, and that if the jury believe that for the ten months next prior to the seizure the claimant properly made re-

turns and paid taxes upon his manufactures, they may fairly infer therefrom a discontinuance of any fraudulent intent which he might have had previously.

IV. That even if the jury find that a fraudulent intent existed in the mind of Lilienthal at the time of making the return of the Kearney & Waterman tobacco, so called, in March, 1865, that fact of itself would not justify them in finding the existence of a fraudulent intent on his part in respect to the property proceeded against at the time that property was found or seized.

V. That if the jury should find that a fraudulent act was committed by Lilienthal in 1865, in respect to property then in his possession, this alone, unless supported by other evidence, is not sufficient to warrant them in finding the existence of a fraudulent intent on his part in regard to the property found in his possession in 1868, and will not justify a verdict of condemnation.

VI. That the act of July 13, 1866, did not require manufacturers of tobacco to make returns to the assessor of the quantity of tobacco manufactured by them.

VII. That if the jury shall find as a fact that Mr. Lilienthal made returns of goods manufactured by him from month to month in no other way than by reporting the amount of such goods sold or removed within the same periods, respectively, that fact is no evidence to support a verdict of condemnation, unless the jury shall believe that that mode of making returns was adopted or used with fraudulent intent on the part of Mr. Lilienthal, or of the persons employed in making such returns.

VIII. That if the jury find that Mr. Lilienthal failed to make return of all the goods sold which he had purchased of other manufacturers, such failure is no evidence to support a verdict of condemnation, unless it

was with a fraudulent intent on the part of Lilienthal, or of those persons employed in making such returns.

IX. That if the jury shall find that in 1865 Mr. Lilienthal returned for taxation and paid a tax of 25 cents per pound upon 3,400 pounds and 3,600 pounds of tobacco shipped in 1867 to W. T. Coleman, in California, then he became liable in no additional tax by reason of said shipment of said tobacco at that time.

X. That if the jury shall find that at the time of the shipment of the 3,400 pounds and 3,600 pounds of tobacco in 1867 to W. T. Coleman, in California, the claimant believed that all the tax due thereon to the government had already been paid, then his failure to return said tobacco for taxation upon said shipment is no evidence of fraudulent intent on the part of the claimant.

XI. That the words "in fraud of the internal-revenue laws," as used in the forty-eighth section of the act of June 30, 1864, are simply equivalent to the words "in fraud of the internal revenue."

XII. That acts in violation of the internal-revenue laws are not acts in fraud of the internal-revenue laws within the meaning of section 48, unless such acts are accompanied by an intent to defraud the United States.

XIII. That there is no evidence in this action that at the time of the finding or seizure of the property in this action the claimant had not paid all the taxes due on all the goods, wares, merchandise, articles, or objects which had been before that date manufactured at his factory and sold or removed therefrom.

XIV. That there is no evidence in this action that any goods, wares, merchandise, articles, or objects on which taxes were imposed by the provisions of law,

manufactured at the factory of Mr. Lilienthal, were ever sold or removed by him, or by any other person, in fraud of the internal-revenue laws, or with design to avoid payment of said taxes.

And the district attorney, on behalf of the United States, submitted the following prayers for instructions to be given to the jury, viz:

I. If the jury find that the books, Exhibits Nos. 138 and 138 A, were kept by Mr. Lilienthal, or his agents, as and for the account in book-form required to be kept by the provisions of the ninetieth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, and that the said Lilienthal and his agents have therein kept no account of the quantity of tobacco or snuff manufactured by said C. H. Lilienthal, at his factory, in Washington street, from August 1, 1866, to January 1, 1868; that quantities of tobacco and snuff were removed for sale and removed from the said place of manufacture during the said period, and that no account of the tobacco and snuff so removed was kept as of removals thereof, and no accurate account of the tobacco so removed was kept in any manner in said books; that large quantities of granulated tobacco and other descriptions of tobacco manufactured were sold by Mr. Lilienthal during said period, and no account of such sales, as sales, was kept in those books; that quantities of purchased manufactured tobacco were sold and removed from the said premises during the period from August 1, 1866, to December 1, 1867, and that no accurate account of such sales or removals was kept in such books; that exhibits numbered 1 to 17, both inclusive, were furnished to the assistant assessor of the district by said C. H. Lilienthal, or his agents, as true and ac-

curate abstracts of all such sales and removals, and were not true and accurate abstracts thereof; that the annual inventories, Exhibits 18 and 19, were made out and delivered by said C. H. Lilienthal to the assistant assessor of the district, severally, as true statements and inventories of the matters and things therein contained, as required by the said ninetieth section, as amended as aforesaid; that it appears from said inventory and abstracts that much more chewing-tobacco and fine shorts was manufactured in said manufactory during the year 1867 than was declared upon said abstracts to have been manufactured; that a large quantity of smoking-tobacco, manufactured on said premises, had been sold or removed during the year 1867, which had not been returned for taxation upon the said abstracts, and of which no account was contained therein, or in the said books, Exhibits Nos. 138 and 148 A; then, the burden of proof is upon the claimant to satisfy the jury that the tobacco so manufactured on said premises, and sold or removed, without due account, return, and entry made thereof in the said books and abstracts, in the manner required by law, was not sold and removed in fraud of the internal-revenue laws, and with intend to evade the taxes thereon; and if the claimant shall not have so satisfied the jury of his intent respecting the same, the jury may infer that the claimant's intent in respect of the same was fraudulent, and that his possession of the goods in the suit was with the like intent.

"II. If the jury find that prior to August 1, 1866, when the act of July 13, 1866, went into effect, changing in some respects the rate of taxation on manufactured smoking-tobacco, a brand of smoking-tobacco known as 'extra long smoking-tobacco,' had been

manufactured by C. H. Lilienthal, by cutting together stripped or stemmed leaf and stems in certain proportions, and had been sold and returned for taxation by him as 'smoking-tobacco' subject to a tax of 35 cents per pound under the existing law; that from the time said act of July 13, 1866, went into effect the said 'extra long smoking-tobacco,' manufactured as aforesaid, was entered by said Lilienthal in the account required to be kept in book form by the ninetieth section of the act of June 30, 1864, as amended by the ninth section of the act of July 13, 1866, of sales and removals of manufactured tobacco, as 'chewing-tobacco,' and was returned upon the abstracts of said accounts, required to be furnished monthly to the assistant assessor of the district by said section as 'chewing-tobacco,' subject to a tax of 40 cents per pound under the provisions of said act of July 13, 1866; that after the said 1st day of August, 1866, said C. H. Lilienthal varied the process of manufacturing said 'extra long smoking-tobacco' by merely increasing the proportion of stem, and from the 21st day of August, 1866, in each monthly return during the years 1866 and 1867, returned for taxation sales and removals of large quantities of the 'extra long smoking-tobacco' so manufactured as 'smoking-tobacco,' subject to a tax of 15 cents per pound under the provisions of said act of July 13, 1866; that the said 'extra long smoking-tobacco' returned as 'chewing-tobacco,' for taxation at the rate of 40 cents per pound, was sold at 70 cents per pound, and the said 'extra long smoking tobacco' returned as 'smoking-tobacco,' for taxation at the rate of 15 cents per pound, was sold at the rate of 60 cents per pound; that no officer of internal revenue was advised by C. H. Lilienthal, or his agents, of the said practice of return-

ing the said 'extra long smoking-tobacco' for taxation at 15 cents per pound; that the Commissioner of Internal Revenue had published his instructions and opinion that tobacco so manufactured was subject under the said act of 1866 to the tax of 40 cents per pound as 'smoking-tobacco,' and never directly or indirectly countenanced or sanctioned the practice of said C. H. Lilienthal in returning the said 'extra long smoking-tobacco,' and if the jury believe from these facts that said Lilienthal and his agents made the said change in the process of manufacturing the said 'extra long smoking-tobacco,' and the said change in the manner of returning the same for taxation during said period from August 1, 1866, to January 1, 1868, for the purpose of selling and removing the same in fraud of the internal-revenue laws and with intent to evade the payment of taxes thereon, then they would have a right to infer that the claimant and his agents had the like intent with respect to the property in suit." (Record, 22 to 24.)

Omitting prefatory remarks, a large part of the charge to the jury is then incorporated into the record (pp. 24 to 34. It may be found entire in 5 Benedict, 113 to 144. The judge then gave the instructions requested by claimant numbered from one to twelve, but refused the thirteenth and fourteenth because they related to matters of fact and not of law. (Record, 34, folio 66, middle, and page 36, folio 70, top.) He acceded to the requests for instructions asked by the district attorney and went over them *seriatim*, as he had those asked by claimant (Record, 36, 37), and then remarked: "I believe those are all the considerations which it is necessary to present to you in regard to this matter. You have listened patiently to the evidence, and to the

summing up of the counsel, which has been exceedingly clear and thorough on both sides, and it is for you to say on your oaths what you believe to have been the intent of Mr. Lilienthal in respect to this property so seized. If the government has not made out to your satisfaction that such intent to commit a fraud upon the law or to evade the payment of taxes, in respect either to the goods on hand, or to the goods to be manufactured out of the raw materials on hand, existed on the part of Mr. Lilienthal at the time the goods were seized, your verdict will be for the claimant." (Record, 37, 38),

And thereupon the counsel for the claimant, as to certain specified parts of said charge of the court, took exception in the following language:

"In the first place, I desire to except to that part of your honor's charge where you charge the jury that the Coleman tobacco, or the Kearney & Waterman tobacco, which was subsequently shipped to California, was made, by the act of March 3, 1865, liable to a tax of 35 cents; also, to that part of your honor's charge where you say that the transaction in the Kearney & Waterman tobacco was wholly illegal and in violation of law; also to that part where your honor says that it was not legal to return that for tax; also, to that part where your honor says that, even if the jury believe that a return was made, and a tax of 25 cents a pound was paid on this tobacco, yet the duty on it had not been paid when the act of July 13, 1866, went into operation, within the meaning of section 70 of that act; also, to that part which charges that the law required Mr. Lilienthal to keep an account in his book of the quantities of tobacco manufactured, independent of and distinct from the account of the quantities sold, and that

it was impossible to make the correct inventory required by the law, unless an account was kept of the quantities manufactured, independent of the quantities sold, and that the removal from the factory to the retail salesroom, at the times referred to in the evidence, was not a removal which authorized a return for taxation under the law." (Record, 38.)

And the several exceptions aforesaid were noted and allowed. And thereupon the counsel for the claimant, as to the refusal of the court to charge as requested in his thirteenth and fourteenth requests, then and there took an exception. And the counsel for the claimant, as to the charge of the court upon his tenth request to charge further requested the court to charge, and the court charged the jury as follows:

"In the tenth request we say: If the jury shall find that at the time of the shipment of the thirty-four hundred pounds and thirty-six hundred pounds of tobacco, in 1867, to W. T. Coleman, in California, the claimant believed that all the tax due thereon to the government had already been paid, then his failure to return said tobacco for taxation upon said shipment, is no evidence of fraudulent intent on the part of the claimant."

"Your honor charged that as requested, but in commenting upon it you stated to the jury that if they should find that Mr. Lilienthal believed that he was bound to pay that tax in March, 1865, and did pay it, then his failure to return the tobacco for tax in 1867 was no evidence of fraudulent intent. I take exception to that part of your honor's charge, and request your honor to charge that if Mr. Lilienthal believed that he had a right to pay, independent of any question whether he

was bound to pay, the fact that he did not subsequently pay in 1867 is no evidence of fraudulent intent."

The COURT. That is a new proposition, and is not embraced in the one you handed to me.

Mr. ROLLINS. I ask your honor so to charge.

The COURT. I do so charge, that if Mr. Lilienthal believed honestly, when he paid that tax on the 31st of March, 1865, that as between him and the government he, as a tobacco manufacturer, had at that time a right to pay that tax, there was no fraudulent intent in his so doing. There is no doubt of that. (Record, 38, 39.)

And thereupon the counsel for the claimant excepted to the instructions given at the request of the district attorney. (Record, 39.)

And thereupon the counsel for the claimant further requested the court to charge, and the court charged the jury as follows:

"We endeavored to embrace in our requests all we deemed important, but one thing is suggested by your honor's charge, which I have no doubt your honor will charge, and that is this: that if the jury shall believe that the mode of returning for taxation the goods sold over the retail counter, by returning them at the time they were transferred to such retail counter, was adopted for the convenience of the claimant, and used without any fraudulent intent on the part of Mr. Lilienthal, or his agents, in his business as a manufacturer, such fact furnishes no evidence in support of a verdict of condemnation in this case."

The COURT. Yes; that is true. The mere naked fact that that was unlawful does not amount to anything; but if, it being so unlawful, the jury believe there was a fraudulent intent in so doing, it is to be taken into

consideration. If the jury believe there was no fraudulent intent in it, it is not to be taken into consideration.

And thereupon the counsel for the claimant further requested the court to charge the jury as follows:

"We made no request to charge as to the rate of tax that was really due on the 'extra-long smoking-tobacco,' and we are inclined to think that the proposition of your honor, that it makes no difference for the purposes of this case, what the rate of tax was, is correct; but, at the same time, as this case involves such a large sum of money, we are unwilling that any failure on our part to take proper exceptions should occur, and therefore we ask your honor to charge as follows: 'If the jury find that, in the process of manufacturing the "extra long smoking-tobacco," a portion of the stem was removed from the leaf, and an amount of stem fully equal to or exceeding the quantity removed was subsequently, during said process, added to and intermingled with the leaf, so that in point of fact the manufactured product was composed of both stem and leaf, and so sold, that tobacco was, between August, 1866, and the date of seizure, liable to a tax of only 15 cents per pound, and was properly returned at that rate.'"

Which request, on the part of the claimant, the court then and there refused to charge, and the counsel for the claimant excepted. And thereupon the counsel for the claimant further requested the court to charge the jury as follows:

"I also ask your honor to charge that the 'extra-long smoking-tobacco,' if manufactured in the manner testified to by Mr. Dennerker, was smoking-tobacco made in part of stems, and was liable, under the act of July 13, 1866, to a tax of 15 cents per pound during all the time

subsequent to August 1, 1866, and prior to the date of seizure of the property proceeded against in this action."

Which request, on the part of the claimant, the court then and there refused to charge, and the counsel for the claimant excepted.

And thereupon the counsel for the claimant further requested the court to charge the jury as follows:

"I also ask your honor to charge that if the 'extra-long smoking-tobacco,' returned as liable to the 15 cents rate, was manufactured in the manner stated in the testimony of Mr. Dennerker, and contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, then the said tobacco was liable, between August 1, 1866, and the time of the seizure of the property herein proceeded against, to the 15 cents tax, as returned."

Which request, on the part of the claimant, the court then and there declined to charge, and the counsel for the claimant excepted. (Record, 39, 40.)

The jury returned as their verdict "that they find for the United States, condemning the goods." (Record, 41; folio 81, middle.) A motion was filed in arrest of judgment on account of the alleged insufficiency of this verdict. (Record, 40; folios 79, 80.) This motion was overruled, and the property accordingly condemned as forfeited. (Record, 41, 42; folios 83 to 85.) The cause was then taken by the claimant to the circuit court, where the proceedings of the district court were in all things affirmed. (Record, 45; folio 93.)

The writ of error to the judgment of the district court was based upon the alleged insufficiency of the verdict to support it and the exceptions taken to the charge. (Record, pp. 45, 46; folios 95 to 99.)

It is presumed that the same errors will be assigned here, though this brief is prepared before any is filed for the plaintiff in error. Adopting this course that the call of the docket may not find us wholly unprepared, we shall file a supplemental brief in reply, if found necessary, and permitted by the court.

STATUTE.

This prosecution is founded upon the forty-eighth section of the act of June 30, 1864, c. 173 (13 Stats., 240), which was amended by the ninth section of the act of July 13, 1866, c. 184, to read thus: "That all goods, wares, merchandise, articles, or objects on which taxes are imposed by the provisions of law, which shall be found in the possession or custody or within the control of any person or persons for the purpose of being sold or removed by such person or persons in fraud of the internal-revenue laws, or with design to avoid payment of said taxes, may be seized by the collector or deputy collector of the proper district, or by such other collector or deputy collector as may be specially authorized by the Commissioner of Internal Revenue for that purpose, and the same shall be forfeited to the United States; and also all raw materials found in the possession of any person or persons intending to manufacture the same into articles of a kind subject to tax for the purpose of fraudulent(ly) selling such manufactured articles, or with design to evade the payment of said tax; and also all tools, implements, instruments, and personal property whatsoever in the place or building, or within any

yard or inclosure where such articles or such raw materials shall be found, may also be seized by any collector or deputy collector, as aforesaid, and the same shall be forfeited as aforesaid; and the proceedings to enforce said forfeiture shall be in the nature of a proceeding *in rem* in the circuit or district court of the United States for the district where such seizure is made, or in any other court of competent jurisdiction. And any person who shall have in his custody or possession any such goods, wares, merchandise, articles, or objects subject to tax as aforesaid, for the purpose of selling the same with the design of avoiding payment of the taxes imposed thereon, shall be liable to a penalty of five hundred dollars, or not less than double the amount of taxes fraudulently attempted to be evaded, to be recovered in any court of competent jurisdiction; and the goods, wares, merchandise, articles, or objects which shall be seized by any collector or deputy collector may, at the option of the collector, be delivered to the marshal of said district, and remain in the care and custody of such marshal, and under his control, until he shall obtain possession by process of law, and the cost of seizure made before process issues shall be taxable by the court: *Provided*, That when the property so seized may be liable to perish or become greatly reduced in price or value by keeping, or when it cannot be kept without great expense, the owner thereof, the collector, or the marshal of the district, may apply to the assessor of the district to examine said property; and if, in the opinion of said assessor, it shall be necessary that the said property should be sold to prevent such waste or expense, he shall appraise the same; and the owner thereupon shall have said property returned to him upon giving

bond in such form as may be prescribed by the Commissioner of Internal Revenue, and in an amount equal to the appraised value, with such sureties as the said assessor shall deem good and sufficient, to abide the final order, decree, or judgment of the court having cognizance of the case, and to pay the amount of said appraised value to the collector, marshal, or otherwise, as he may be ordered and directed by the court, which bond shall be filed by said assessor with the United States district attorney for the district in which said proceedings *in rem* may be commenced: *Provided further*, That in case said bond shall have been executed and the property returned before seizure thereof, by virtue of the process aforesaid, the marshal shall give notice of the pendency of proceedings in court to the parties executing said bond, by personal service or publication, and in manner and form as the court may direct, and the court shall thereupon have jurisdiction of said matter and parties in the same manner as if such property had been seized by virtue of the process aforesaid. But if said owner shall neglect or refuse to give said bond, the assessor shall issue to the collector or marshal aforesaid an order to sell the same; and the said collector or marshal shall thereupon advertise and sell the said property at public auction in the same manner as goods may be sold on final execution in said district; and the proceeds of the sale, after deducting the reasonable costs of the seizure and sale, shall be paid to the court aforesaid, to abide its final order, decree, or judgment." (14 Stats., 111, 112.)

BRIEF.

The trial of this cause in the district court occupied three or four weeks. (5 Benedict, 113.) It was opened to the jury April 10 (Record, 6, top), and their verdict was rendered May 8, 1871 (Record, 41, folio 81). Being closely contested, the result is the somewhat extended record before us. All the testimony introduced by the government was for the purpose of showing a design on the part of Mr. Lilienthal to use the libeled property as a means of defrauding the United States. The exceptions taken at the trial by his counsel raise only the question of the competency or sufficiency of the evidence, as tending to establish such fraudulent intent. They do not show that any testimony offered by the claimant, to rebut the presumption of fraud, was excluded; nor, indeed, that he denied it. The district attorney called Mr. Lilienthal, his foreman, and others in his employ to the witness-stand, and introduced his books; the cause was thus fully and ably presented, so that the learned judge, in committing it to the jury, remarked: "And it is a result of this entire and thorough competency of the counsel on both sides, that that happens in this case which rarely happens in any case tried before this court or any other court, that *the court is able to assent, and does assent*, as I shall hereafter state to you, *to all the propositions of law presented on both sides of this case*, as requests to the court to charge the jury, *leaving merely a question of fact for your consideration.*" (5 Ben., 114.) The jury were then told that this question was entirely for them to determine. (*Ib.*) If in the multitude or ability of counsel there was any safety for the claimant, he cannot say but that his interests have been protected from the

commencement until now; for he has had Messrs. Evarts, Southmayd & Choate (Record 5, bottom); Harland & Rollins, B. K. Phelps (Record 6, top); Geo. T. Curtis, V. Birdseye, Norris & Lord (Record 45, middle); and, though last not least, the able counsel now representing him here, besides *dii minores* not known to the record.

The main, if not the sole, issue in this case was whether or not Mr. Lillienthal had a fraudulent intent so to use the libeled property as to defraud the United States of its revenue. Incidentally, questions arose as to the proper method of establishing this *fact;* for the question of intention is one of fact only—certainly, *fraudulent* intent is such a question. (Moss *v.* Riddle, 5 Cranch, 357; Clift *v.* White, 12 N. Y., 538, top; Miller *v.* People, 5 Barb., 204–5.)

"Intention, in the sense of design, purpose with which an act is done, is a common subject of inquiry by a jury. Intention is a mental fact; it exists in the mind of the man who conceives it. It is in his power to conceal it from all other men. If he does nothing by word or act to disclose it, no one else can penetrate to it, no other person need imagine its existence. But the man himself, in whose mind it exists, can and often does disclose it to others purposely and expressly by his words, oral or in writing. And, besides, through some act of his, undesignedly on his part, his intention may be revealed. *If from his intention as their source he does certain acts, from them other persons may, contrary to the man's will and expectation, infer the intention from which his acts proceeded.*" (Ram on Facts, 275.) Without the performance of *some* act (though it may be merely that of possession or ownership), the law would not undertake

to punish the foulest intent the mind could conceive; nor is a person subjected to criminal punishment for the most serious consequences of his act if his mind is not tinged with its guilt. "Neither in philosophical speculation nor in religious or moral sentiment would any people in any age allow that a man could be deemed guilty unless his mind was so." (1 Bish. Cr. Law, § 287, *et seq.*) This relates to an act as a crime. In civil procedure, a man is often made to suffer in his estate for the consequences of his act, without regard to the innocency or criminality of his motives. Though the present proceedings are civil and not criminal in their nature (Taylor *v.* United States, 3 How., 197; Cliquot's Champagne, 3 Wall., 145, top; United States *v.* Three Tons of Coal, 6 Biss., 379), the above printed section makes the liability of the property to forfeiture dependent upon a conceived but not yet fully-executed fraudulent intent; the possession and manufacture of the articles being such acts toward the execution of the illegal purpose as will justify condemnation.

The object of referring to these elementary principles is to remark that, though intention is a fact for the jury, yet it is a mental fact which, from its very nature—especially if fraudulent and its possessor therefore desirous of concealing it—must be shown as an inference from the party's acts; not merely those done with reference to the single object of litigation, but taken also with other similar acts performed at or about the same time. Therefore it is that great latitude is allowed in the introduction of testimony in such cases (23 Howard, 187), and the matter is left to be regulated by the judge presiding at the trial, and made dependent upon the character and circumstances of the particular case, rather

than limited by rigid rules, confining the acts to be proved to those done with the particular property in controversy. Wood *v.* United States, 16 Peters, 360; Castle *v.* Bullard, 23 Howard, 187, citing 1 Starkie on Ev., 58; Humes *v.* Scruggs, 94 U. S., 28; McLaughlin *v.* Bank, 7 How., 220; Warner *v.* Norton, 20 How., 458, bottom; Bottomly *v.* United States, 1 Story, 143, *et seq.*; Carr *v.* Gale, 2 Ware (Davies), 328; United States *v.* Isla de Cuba, 2 Cliff., 295; Deakers *v.* Temple, 41 Penn. St., 242; Loucheim *v.* Henszey, 77 Penn. St., 305; Donelly *v.* Hoffman, 3 Brewst., 32; Kauffman *v.* Swan, 5 Penn. St., 230; McKenney *v.* Dingley, 4 Maine, 172; Phinney *v.* Holt, 50 Maine, 570; Smyth *v.* Hyndman, 10 Cush., 555; Hale *v.* Taylor, 45 N. H., 407, top; Matthews *v.* Rice, 31 N. Y., 460; Peck *v.* Crouse, 46 Barb., 157; Reed *v.* Noxon, 48 Ill., 323; Bullock *v.* Narrott, 49 Ill., 62; Gardner *v.* Boothe, 31 Ala., 189, § 3; Mason *v.* State, 42 Ala., 532; Wilson *v.* Maxwell, 57 Mo., 146; Miller *v.* Stewart, 24 Cal., 502; Farmer *v.* Calvert, 44 Ind., 212; Zerbe *v.* Miller, 16 Penn. St., 495; Stewart *v.* Fenner, 81 Penn. St., 180; Kinzer *v.* Mitchell, 8 Penn. St., 64. "If it be asked how, at a trial in the Crown court, the intent of the party charged is to be discovered, I reply, by facts and circumstances; by the precedent, concomitant, and subsequent circumstances; by the manner of doing the principal act, and the like." Broom's Philos. of Law, 224–5, § 172; Craig's Ap., 77 Penn. St., 460, top; Williams *v.* Woodman, 8 Pick., 79; Stebbins *v.* Miller, 12 Allen, 591; Lovell *v.* Briggs, 2 N. H., 218; Long *v.* State, 1 Swan, 288, bottom; Hopkins *v.* Sievert, 58 Mo., 201.

I.

After the recital of the substance of the charge, the counsel for the claimant took these exceptions, found upon p. 38 of the record, at the top of folio 74.

The first is to the instruction "that the Coleman tobacco, or the Kearney & Waterman tobacco, which was subsequently shipped to California, was made by the act of March 3, 1865, liable to a tax of 35 cents; also, to that part of your honor's charge where you say that the transaction in the Kearney & Waterman tobacco was wholly illegal and in violation of law; also, to that part where your honor says it was not legal to return that for tax;" also, "that, even if the jury believe a return was made and a tax of 25 cents a pound paid on this tobacco, yet the duty on it had not been paid when the act of July 13, 1866, went into operation, within the meaning of § 70 of that act."

The foregoing exceptions are all based upon the assumption of the legality of Mr. Lilienthal's course with relation to this particular lot of tobacco (identified in the charge as "the Orinoco tobacco"), as detailed upon the record, pages 12 (bottom) to 14, and in this brief, pages 7 to 11. If the instruction that it was illegal was incorrect, the other objections become immaterial, whether well taken or not; though it would appear that they must stand if this one prevails, or fall with it. The propriety of this statement, then, will be first considered, before the others are briefly noticed.

It is premised that there was no objection to the admission in evidence of this transaction, nor any question as to its being a fact, from which the jury might (or might not) draw an inference of fraudulent intent as to

the libeled property, *if* the law would hold this one to be illegal; but the claim is that it was legal and proper.

1. The portion of the charge to which this exception applies is found on page 29 of the record. Near the top of that page commences the statement of the admitted facts; and on the lower half (folio 57) the details of the alleged sale to Kearney and Waterman, as testified to by the claimant (see also pages 7 to 11 of this brief). Up to and including March 31, 1865, this tobacco, if sold *bona fide*, would have been taxable at 25 cents a pound; but by the act of March 3, 1865, c. 78 (13 Statutes, 447, near bottom), it was declared that the tax should be, after April 1, 1865, "On smoking tobacco of all kinds, *and imitations thereof* not otherwise herein provided for, 35 cents per pound." In view of this increase, and to evade it, as he testified, Mr. Lilienthal entered upon his sales-books as sold to Waterman & Kearney, of New York City, under date of March 31, 1865, the whole mass of this tobacco, worth $60,000. The learned judge stated the facts to the jury more strongly in the claimant's favor than his own testimony would warrant; for the judge assumed that "Kearney & Waterman gave him their check for that amount; and two or three days afterward he gave to Kearney & Waterman his check for the same amount. The tobacco was not removed from his establishment, and never passed into the possession of Kearney & Waterman. Mr. Lilienthal kept it on his own premises, and after he bought it back (as the expression is) he treated it as his own and disposed of it as such." (Record, 29, folio 57.) Upon the top of page 14 of the record (and *ante*, p. 9, top), it is stated that Mr. Lilienthal testified "that the *said goods were never delivered* to said Kearney & Waterman, *and were never in*

tended to be delivered to them; nor were they removed from said factory; that it was understood between him and said Kearney & Waterman that the goods were sold and bought back, and he believed, *though he was not positive about it*, that he *exchanged checks* with them for the amount of the bill; that this proceeding was *for the purpose of returning the said goods as sold* in his monthly return for taxation for the month of March, 1865, *in order to avoid payment of an increased rate of taxation* to which said goods would be liable under the act of March 3, 1865, which was to take effect on April 1, 1865." (13 Statutes, 487, top; § 18.) Upon the claimant's detail of it the judge remarked, "it is my duty to say to you that that transaction was utterly illegal." (Record, 29, bottom.) "It is perfectly clear that that transaction was no real sale of the property. It was not intended to be a sale. It was, as it has been well characterized here, a perfect sham from beginning to end." (Record, 30; folio 58, middle.)

Were these observations justified by the testimony, or were they legally incorrect?

"Where the facts are proved, and are not controverted, it is a question of law whether they show a sale." (Fuller *v.* Bean, 34 N. H., 299, bottom, citing Houdlette *v.* Tallman, 14 Maine, 403, and Burrows *v.* Stebbins, 26 Verm., 659.) The intent of a perfected sale would be for the jury; but whether the undisputed facts constituted a perfect sale, is for the court. Even if Mr. Lilienthal's belief was correct, and checks were exchanged, that would not amount to a sale; for each check offset the other, and the pretended sale was without *consideration*, *delivery*, a purpose on the part of Lilienthal to sell, or on that of Kearney & Waterman to buy. A

merely colorable sale of personal property, made with the intention that the title should not be transferred in reality but only in appearance, conveys no title whatever to the apparent purchaser. (Hyam's case, 1 De Gex, Fisher & Jones, 75; Bowes v. Foster, 2 Hurlst. & Norm., 779; Cox v. Jackson, 6 Allen, 108; Bradley v. Hale, 8 Allen, 59.)

"*A sale of chattels without delivery*, or a conveyance of land without consideration, *is conclusively presumed to be fraudulent* as against creditors," &c. (Kaine v. Weigley, 22 Penn. St., 183, middle, where there is an excellent statement of the law as to the proof and presumption of fraud, per Black, C. J.)

The only objection made by claimant's counsel to the admission of proof of this transaction was based upon its *immateriality*. If shown to be fictitious, and made with design to evade the lawful tax, it was one incident of a fraud upon the revenue perpetrated by Mr. Lilienthal, from which, with other circumstances, the jury might infer a like intent as to the property claimed. "The evidence complained of, * * * though not directly relevant to the immediate issue, was such as is usually admitted in cases of fraud. * * * It is a bad sign for parties who have been convicted of a fraud to complain of an excess of evidence. Their effort to draw the narrowest possible sight upon the pending issue, and to exclude everything which, according to the most rigid rules of evidence, is not relevant to it, indicates a consciousness that the transactions which surround the main fact will not bear investigation. But all experience proves, and the rules of evidence are founded in human experience, that if fraud is to be detected under the various cloaks it puts on, the conduct

of the parties before and after the fact complained of, as well as in immediate connection with it, must be freely examined. Truth and honesty are not likely to suffer by the latitude of evidence allowed in cases of fraud, for the more thoroughly an honest transaction is investigated, the more honest it will appear." Deakers *v.* Temple, 41 Penn. St., 242, per Woodward, J.

2. To what tax was it liable?

If the pretended sale to Kearney & Waterman was in law and in fact *no sale*, but merely a pretense, then Mr. Lilienthal continued the owner and possessor of the unsold goods upon the 1st day of April, 1865, and liable to pay the increased tax accruing that day under the act of March 3, 1865.

We will further briefly consider this exception in connection with the next.

3. Was it legal to return it for tax? The jury were told, "it was illegal to return the Orinoco tobacco for tax, because it was not sold, nor was it removed for consumption." (Record, 30, lines 14, 15, *ante*, p. .)

The act of June 30, 1864, c. 173, § 94, not changed in this respect by the act of March 3, 1865, enacted "that upon the articles, goods, wares, and merchandise here-

inafter mentioned, except where otherwise provided, which shall be produced *and sold*, or be manufactured, or made *and sold*, or be consumed or used by the manufacturer or producer thereof, or removed for consumption, or for delivery to others than agents of the manufacturer or producer within the United States or Territories thereof, there shall be levied, collected, and paid the following duties, to be paid by the producer or manufacturer thereof, that is to say," &c. (13 Stat., 264, § 94.)

The mere manufacture or production and possession of goods intended for sale did not create a liability to tax. That accrued only upon their sale or removal from the custody of the producer or manufacturer. It was because he understood this perfectly that Mr. Lilienthal went through the form of a sale to Kearney & Waterman, that he might appear to the revenue-officers to have complied with the letter of the law, though violating its spirit. And this is all that is material. The object of introducing this testimony was to show a fraudulent disposition on the part of Mr. Lilienthal; and this purpose is subserved when it is made apparent that he resorted to the pretext of a fictitious sale to deceive the assessor of internal revenue. The *intent* was the same, whether the fiction resorted to was necessary for the procurement of the pecuniary advantage expected or not.

It *was* necessary for the purpose of evading the increased tax, and it was essential that the government officials should be deceived by the pretended sale, because it was the happening of this event that created the liability to taxation. The claimant's position was that whether the sale was valid or not was immaterial, because if the goods remained uninterruptedly the prop-

erty of Mr. Lilienthal he still had the right to return them for taxation, and that the government could not be said in law to have been injured by his exercise of this right. This claim is untenable. It is only *accrued* taxes that the collector is entitled to receive or the citizen to pay. If one citizen can pay in advance anticipated levies and thereby escape at a reduced rate, all can do it; if one tax can be thus discounted in advance, the prepayment may run over a series of coming months or years, and thus the design of the legislator be defeated, the responsibility of the collector and of his sureties be enhanced beyond expectation or calculation, and the doors opened wide for fraud and peculation. The very nature of the imposition and the uses to which it is appropriated show that it is only payable as it accrues, according to the letter of the law, and that neither the manufacturer of domestic goods nor the importer of foreign articles can claim the right to pay excise or customs dues on the business he hopes to do in the future, the goods he proposes to import, or upon the sales he expects to make. In this particular business the particularity of the annual inventories and monthly returns required shows that the strict scrutiny intended to be kept over the detailed actual operations of the manufacturer would be easily evaded if returns could be made and taxes could be assessed and paid in advance of actual sales, leaving goods upon which payment had been made to be mingled with the mass of the stock at the factory upon which the taxes had not been paid.

4. The *sole* ground upon which counsel objected to the admission of proof of the spurious sale to Kearney & Waterman was that it "was *immaterial*, as it appeared that a tax of twenty-five cents per pound had been paid on such tobacco under the act of June 30, 1864." (Record, 14, top.) Exception was also taken to that part of the charge where it was said, substantially, "that even if the jury believe that a return was made and a tax of twenty-five cents a pound was paid on this tobacco, yet the duty on it had not been paid when the act of July 13, 1866, went into operation, within the meaning of section seventy of that act." (Compare Record, p. 38, folio 74 and pp. 30 and 31, folios 59, 60, and 61; see also *ante*, pp. .) The portion of this section which touches the point in issue is the first clause of its last proviso: "That all manufactures and productions on which a duty was imposed by either of the acts repealed by this act, which shall be in the possession of the manufacturer or producer, or of his agent or agents, when this act takes effect, the duties imposed by any such former act not having been paid, shall be held and deemed to have been manufactured or produced after such date." (14 Stat., 173, lower half.) The first sentence of this section declares that the act shall take effect August 1, 1866. From March 31, 1865, to that date and thereafterward until April and May, 1867, this Orinoco tobacco had remained unsold in Lilienthal's manufactory. In these last-named months it was sold to one Coleman, and shipped to him in California in two lots. (Record, 12, 13; *ante*, 7, bottom.) It was not returned for taxation as sold or removed for sale during those months. (Record, 13, top.) The reason assigned for the omission was that twenty-five cents a pound had been paid upon its

being returned as sold to Kearney & Waterman March 31, 1865, being the rate assessable under act of June 30, 1864, c. 173, § 94. (13 Stat., 270, middle.) By the amendatory act of March 3, 1865, c. 78, § 1, taking effect April 1, 1865, the tax was increased to thirty-five cents a pound. (13 Stat., 477, near bottom.) This act of July 13, 1866, c. 184, § 9, reduced it to fifteen cents. (14 Stat., 133, middle.) The jury were told that this latter duty never was paid. This instruction was correct. We have before noticed that the act of June 30, 1864, c. 173, § 94, made the tax payable when the articles were sold or removed. (13 Stat., 264, middle.) This requirement was left unchanged by the amendatory act of March 3, 1865, c. 78, § 1. (13 Stat., 475, 477.) It was repeated in terms in the act of July 13, 1866, c. 184, § 9. (14 Stat., 128, top.)

The accidental circumstance that the return of peace permitted a reduction of the tax, instead of demanding an increase, cannot affect the legal question whether or not the specific tax established by this act of July 13, 1866, had been paid or not. By deception and the fraudulent pretext of a sale, where there was none, Mr. Lilienthal induced the collector of internal revenue to accept certain moneys in the spring of 1866 as and for a tax, when none was due. Unless the goods were actually sold, this payment was no more applicable to this particular lot of tobacco than to any other in the factory; it was equally inapplicable to all, unless there had been a sale which justified the application. Mr. Lilienthal paid it, representing it to be the lawful tax upon tobacco sold Kearney & Waterman, March 31, 1865, and the collector received it upon the faith of and his belief in

that representation; it was never paid nor received as and for a tax upon goods sold more than two years later, and shipped to California. It was a voluntary payment received by the collector through a mistake of fact superinduced by the fraud and misrepresentation of Mr. Lilienthal, who paid it voluntarily, with full knowledge of all the facts. But for this he might, perhaps, have had a claim for a refund, but that would be all; as it is, he could neither claim the money so paid, nor change its application so made in pursuance of his own sworn statements. Though the government can show that the pretended sale to Kearney & Waterman was a fraud, he is estopped to set it up and claim restitution of the sum he paid on account of it. If he cannot directly claim a refund, he cannot accomplish it indirectly by procuring the application of the money to a tax which subsequently accrued, and which he was bound to pay when it accrued, and not till then. It is of no consequence that he would still be a loser to the extent of ten cents a pound by this payment of March 31, 1865, upon the two small lots shipped to California. He had disposed of most of the $60,000 worth under the previous act, evading ten cents a pound of the lawful tax upon it, if not the whole tax. If permitted to apply this payment to the tax accruing in April and May, 1867, under act of July 13, 1866, he would be benefited to the extent of fifteen cents a pound, whereas by law he was not entitled to derive any benefit whatever from his own fraud, *nor to such a subsequent application of the money as would avert its consequences.* If the payment was of any tax, it was of that accruing March 31, 1865, under the act of June 30, 1864; it was either that or it was nothing; and in either case it was no payment of the tax accruing upon the sale of

goods sold after the statute of July 13, 1866, took effect; so, in any view, the instruction was correct.

Right or wrong, it was *immaterial*, since the part of the transaction most glaringly evasive and fraudulent was the pretended sale, made to evade the increased tax coming upon the goods April 1, 1865, and not the reduced one established from and after August 1, 1866. It was the intent to evade the law of March 31, 1865, and not that of July 13, 1866, that the district attorney wished to show and upon which he relied. So this ruling, though right, was of no consequence, and therefore exceptions would not have lain to it, even had it been wrong.

II.

The next exception to the charge inviting our attention is "that which charges that the law required Mr. Lilienthal to keep an account in his book of the quantities of tobacco *manufactured*, independent of and distinct from the quantities *sold*; and that it was impossible to make the correct inventory required by law unless an account was kept of the quantities manufactured independent of the quantities sold." (Record, 38, middle.) The language considered exceptionable is found on page 61, folio 31, of the record, and *ante*, p. —.

1. The law assumed to require a book-account of manufactures is statutory. We have, therefore, only to cite the statute supposed to impose this obligation, to enable the court to decide whether the instruction was correct or erroneous. It is section 90 of the act of June 20, 1864, c. 173, (13 Stats., 262), as amended by the act of July 13, 1866, c. 184, § 9, to read thus: "That section ninety be amended by striking out all after the enacting clause and inserting in lieu thereof the following: That any person, firm, company, or corporation, now, or hereafter engaged in the manufacture of tobacco, snuff, or cigars, of any description whatsoever, shall be, and hereby is, required to make out and deliver to the assistant assessor of the assessment district a true statement or inventory of the quantity of each of the different kinds of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems, held or owned by him or them on the 1st day of January, of each year, or at the time of commencing business under this act, setting forth what portion of said goods was manufactured or produced by him or them, and what was purchased from others, whether chewing, smoking, fine-cut, shorts, pressed, plug, snuff-flour or prepared snuff, or cigars, which statement or inventory shall be verified by the oath or affirmation of such person or persons, and be in manner and form as prescribed by the Commissioner of Internal Revenue; and every such person, company, or corporation, shall keep in book form an accurate account of all the articles aforesaid thereafter purchased by him or them, the quantity of tobacco, snuff, snuff-flour, or cigars, of whatever description, manufactured, sold, consumed, or removed for consumption or sale, or removed from the place of manufacture, and he or they shall, on or before the tenth day of each

month, furnish to the assistant assessor of the district a true and accurate abstract of all such purchases and sales, or removals, which abstract shall be verified by oath or affirmation; and in case of refusal or neglect to deliver the inventory, or keep the account, or furnish the abstract aforesaid, he or they shall forfeit the sum of five hundred dollars, to be recovered with costs of suit. And it shall be the duty of any manufacturer or vendor of tin-foil or other material used in manufacturing tobacco, snuff, or cigars, on demand of an officer of internal revenue, to render to such officer a correct statement, verified by oath or affirmation, of the quantity and amount of tin-foil or other materials sold or delivered to any person or persons named in such demand; and in case of refusal or neglect to render such statement, or of cause to believe such statement to be incorrect or fraudulent, the assessor of the district may cause an examination of persons, books, and papers to be made in the same manner as provided in the fourteenth section of this act. And all the provisions of law relating to manufacturers generally, so far as applicable and inconsistent herewith, shall be held to apply to the manufacture of tobacco, snuff, and cigars. [See 14 Stats., 474, lines 11 to 14, for amendment coming in here, as the same is below recited.] *Provided*, That the tax imposed upon the manufacturer of tobacco, snuff, and cigars shall be held to accrue upon the sale or removal from the place of manufacture, unless removed to a bonded warehouse: *Provided further*, That manufactured tobacco, snuff, or cigars, whether of domestic manufacture or imported, may be transferred, without payment of the tax, to a bonded warehouse established in conformity with law and Treasury regulations, under

such rules and regulations, and upon the execution of such transportation-bonds or other security as may be prescribed by the Commissioner of Internal Revenue, subject to the approval of the Secretary of the Treasury; said bonds or other security to be taken by the collector of the district from which such removal is made, and may be transported from such a warehouse to any other bonded warehouse established as aforesaid, and may be withdrawn from bonded warehouse for consumption on payment of the tax, or removed for export to a foreign country without payment of tax, in conformity with the provisions of law relating to the removal of distilled spirits; all the rules, regulations, and conditions of which, so far as applicable, shall apply to tobacco, snuff, or cigars in bonded warehouse. And no drawback shall in any case be allowed upon any manufactured tobacco, snuff, or cigars." (14 Stats., 124, 125.)

The amendatory act of March 2, 1867, c. 169, § 9, inserted this after the word "cigars," and before the first proviso of the foregoing section: "And all proceedings relating to forfeiture and sale of distilled spirits shall apply to tobacco, snuff, and cigars." (14 Stats., 474.)

It will be noticed that the manufacturer is required to inventory the quantity of *each of the different kinds* of tobacco, snuff-flour, snuff, cigars, tin-foil, licorice, and stems held or owned by him, * * * setting forth *what portion of said goods was manufactured* or produced by him or them, *and what was purchased from others*, whether smoking, chewing, fine-cut, shorts, pressed, plug," &c., &c. * * * "and every such person, company, or corporation shall *keep*, IN BOOK-FORM, an accu-

rate account of all of the articles aforesaid thereafter purchased by him or them, the quantity of tobacco, snuff, snuff-flour, or cigars, *of whatever description*, MANUFACTURED, SOLD, consumed, *or* removed for consumption or sale, or removed from the place of manufacture." (14 Stats., 124, near bottom.) In that portion of the section relating to the inventory, tin-foil and licorice are mentioned with the other articles, because that is to state the stock on hand for consumption in the business of tobacco-manufacturing for the ensuing year, though these two items are purchased of others and used in the same state as when bought—not undergoing any further manufacturing operation. In the next clause, relating to the book-account, it is not only provided that these purchases must appear, but that the manufacturer must enter every pound of tobacco or snuff and every cigar made by him in his business out of these material; and, further, account for them as sold, consumed, or removed; and, if the latter, whether for sale or consumption, or as still the property of the manufacturer. This is to enable the officers to determine whether or not the quantities of the manufactured articles returned account for the quantities of material consumed; and to this end the venders of tin-foil, &c., may be compelled to tell how much of those articles they have sold, and to whom.

The wherefore is of no consequence, however. The statute is explicit. If its unambiguous language does not authorize the instruction given, it cannot be vindicated by argument.

2. The casual remark that it would be impossible to make *the* inventory required by law unless separate accounts were kept of the quantities manufactured and of

the quantities sold was hardly material enough to afford a basis of exceptions. It is enough that the law demanded the keeping of the account, without inquiring whether or not the other statutory requirements could be complied with if this was not observed.

Material or immaterial, the instruction was correct. It would be impossible to return annual inventories, so specific as the law required, unless account were kept of the purchases, sales, manufactures, and removals. A man might return on each 1st of January the quantities and items of the stock on hand, but unless he kept an account of it in some form or method, he could not set forth "what portion of said goods was manufactured or produced by him and what was purchased from others." Mr. Burroughs, author of the recent work on Taxation, is a resident of the tobacco-producing State, and familiar with the practical operations of the business and of the statutes relating thereto. Speaking of the statement which venders of tin-foil, &c., are required to render on demand, he says: "The statute does not require the farmer or dealer in materials for the manufacture of tobacco or snuff, other than leaf-tobacco, to keep a record of his sales, but it would be *simply impossible* for him to comply with the demand for the statement unless he does." (Burroughs on Taxation, 643, near bottom, ch. xxvi, § 170.)

It is not necessary, however, to have recourse to experts. The insuperable difficulty which the failure to keep an account would be to the making up of a correct inventory is obvious to any apprehension. Without traveling out of the record, we see it practically illustrated in this case. Not keeping the requisite account of manufactures, &c., Mr. Lilienthal could not make his

returns and inventories correspond. "*Si monumentum quæris, circumspice.*"

III.

The next exception was to the statement that the removals of tobacco from the factory to the retail sales-room, at the times and in the manner stated, did not authorize a return of it for taxation. (Record, 38, middle, and 33, middle; see also *ante*, pp. 12 to 16.)

The amended section 90, above printed, requires accurate entries in the book-account of all sales. Mr. Lilienthal, on the contrary, entered sales when he had made none, and failed to enter them when made. When brought down-stairs and put into the retail shop it was not sold, though so entered. It was still Mr. Lilienthal's. When delivered to the customer no record was made, nor was the monthly abstract required by the statute of such sales ever returned. The consequence was that orders filled could not be specifically traced. Of the large mass of Oronoco tobacco, only 7,000 pounds were traced as sold in April and May, 1867. The balance, being returned as sold March 31, 1865, was in fact sold under the law which took effect the succeeding day, *increasing the tax*, and no record was made of these sales. The government was completely deprived of the benefit of the checks provided by law.

IV.

The refusal to give the thirteenth and fourteenth instructions requested by claimant was made the ground of an exception. (Record, 38, folio 74.) The thirteenth asked the judge to instruct the jury that there was no evidence that at the date of seizure all the taxes due on the goods manufactured at Mr. Lilienthal's factory, or sold and removed therefrom, had not been fully paid; and the fourteenth was that there was no evidence that any such goods had ever been removed fraudulently.

There were 7,000 pounds of Oronoco tobacco only accounted for. The jury should say whether or not the balance was fraudulently removed, and were told they should not so consider if satisfied that Mr. Lilienthal *supposed* he had the right to remove it. (Record, 39, top.) If the removal of that tobacco be passed over, there were large quantities first removed in mass from up-stairs to the retail room to be there sold, without any record being kept of the sales. Whether or not there were fraudulent removals of untaxed tobacco was for the jury.

But the exceptions expressly state that there *was* evidence tending to show that tobacco, &c., *had* been removed without payment of the taxes accruing thereon. (Record, 6, folio 15; 12, lower half; 16, lower half.) The testimony therefore did not authorize the giving of the requested instructions.

V.

The next exceptions relate to the two instructions which were given in compliance with the request of the district attorney.

The first of these was, in substance, that if the jury were satisfied the goods made and sold by claimant were not entered upon his books as required by law, and that large quantities were sold and removed without being so entered, or any abstract of such sales being returned, *or any return of them for taxation being made*, and that the sworn inventories for 1867 and 1868 were untrue, then that the burden of proof was thrown upon the claimant to show that the tobacco so made, sold, and removed without any account kept thereof, was not so dealt with in fraud of the revenue law and with intent to evade the taxes thereon; and if the claimant has not satisfied the jury that his intent was *not* fraudulent, the jury may infer that it was so, and that he entertained the like intent with reference to the goods seized. (Record, 22, 23; *ante*, .)

This question may be divided. First: Did proof of acts and omissions, false returns, and failures to make any return, throw upon the claimant the burden of proving that these things were not fraudulently done and omitted? Second: If so, and the jury were legally satisfied of the fraudulent intent as to the goods to which such acts and omissions related, would that justfy the inference that a like intent was entertained as to the property in controversy?

1. Did the acts and omissions recited throw upon the claimant the burden of proving good faith *as to the goods to which they related?*

In other words, in a civil proceeding like this, is a man presumed to intend the natural consequences of his conduct? Disregarding for months and years all those provisions intended as safeguards against fraud, and thereby depriving the United States of just revenue, the jury were told that, unless he explained his conduct consistently with honesty, they might infer that it was done fraudulently. The instruction is to be taken in connection with those previously given at claimant's request, and with those subsequently given at his request, especially those stating that if he honestly *believed* he had a right to return the Oronoco tobacco for taxation March 31, 1865, no inference of fraud could be drawn from that act (Record, 39, top); and if his conduct in removing and returning for taxation goods taken from the factory to the retail department was *honestly* adopted for his own convenience, no such inference arose therefrom; the judge responding, "Yes, that is true. The mere naked fact that it was unlawful does not amount to anything; but if, it being so unlawful, the jury believe there was a fraudulent intent in so doing, it is to be taken into consideration." (Record, 39, middle.)

The instruction excepted to is founded upon the hypothesis that the jury find not only that there were omissions and false entries as to the books, &c., but "that a large quantity of smoking-tobacco manufactured on said premises had been sold or removed during the year 1867 *which had not been returned for taxation* upon the said abstracts, and of which no account was contained therein, or in the said books." Then only was

the burden of proof thrown on the claimant of showing that all this was not done fraudulently. (Record, 23; *ante*, . That is, if there was evidence not only of omissions and false entries calculated to deceive and defraud, but that they actually had this effect, so that large quantities of taxable commodities were sold and consumed without paying any tax, the jury were to presume, in the absence of explanation or rebutting proof, that the actor designed his unlawful acts to have the effect, prejudicial to the government and beneficial to himself, which they were calculated to produce and did produce. Stating the proposition in other language, if the claimant did in fact evade taxes by means of omissions and false entries and returns, he is presumed to have made such omissions, entries, and returns for the purpose of accomplishing such evasion. A man having the strongest motive to attain a given end is shown to have adopted means appropriate to that end, and thereby to have accomplished it; he is presumed to have selected the means for the purpose of accomplishing it. An unlawful act is evidence of an unlawful intent. Tucker *v.* McClure, 17 Iowa, 583.

The exception, if argued at all here, must be placed upon the ground that the general burden of proving its case rests upon the government. Certainly there can be no controversy about that. This instruction relates only as to the method of proof. In the course of the trial as to the liability of certain property to forfeiture, it is shown that there have been evasions of taxes, as to other property, by means of false entries and omissions. This is merely incidental and collateral to the main issue. Though the general burden still rests on the government, the legal effect of this testimony is de-

termined by the application of the legal rule that a man is presumed to intend the natural consequences shown to have resulted from his acts, especially when these acts are the falsification of papers and of *sworn* statements and returns, and the intent wherewith they are done are the questions to be decided. This doctrine is applied even in capital cases. "A sane man, a voluntary agent, acting upon motives, must be presumed to contemplate and intend the necessary, natural, and probable consequences of his own acts." (Com. *v.* York, 9 Met., 103, top, *et seq.*, where Shaw, C. J., enters into a discussion of that subject, which he again examines in Com. *v.* Webster, 5 Cush., 305, where he adds that "the fact of killing being first proved, *all the circumstances of accident, necessity, or infirmity are to be satisfactorily established by the party charged*, unless they arise out of the evidence produced against him to prove the homicide and the circumstances attending it."

Possibly effort will be made to sustain these exceptions by an argument attempting to make a technical distinction between the burden of proof and the raising of a presumption to be rebutted; and alleging that although the evidence of an evasion of taxes by unlawful omissions, entries, and returns leads to the presumption of fraudulent intent to evade an assessment, the burden of proof does not shift. After all, this is a mere dispute about terms, not involving the merits; yet the language of the judge was technically correct, under the circumstances of the present case, to which alone it is to be applied. It will be borne in mind that *the jury were not told that the burden of proof as to the whole case was changed;* but only that it was shifted as to the presumption arising from the proof of loss to the government

arising from the claimant's unlawful acts and omissions. This position is sustained not merely in its spirit by reason and common sense, but in the precise phraseology in which it was expressed by the best writers upon the subject. The presumption that a man intends the natural consequences of his acts is a *rebuttable* presumption of *law*. (Best on Ev., § 305; 1 Greenl. on Ev., §§ 14, 33; Starkie on Ev., 586–587; 1 Taylor on Ev., §§ 61, 68, 71, and 97.) This author commences the last-cited section thus: "§ 97. Such being the nature of disputable presumptions of law, it is obvious that, theoretically, they differ from mere presumptions of fact in three important particulars. In the first place, the judge is *bound* to explain to the jury whatever legal presumptions arise from the facts proved; next, the jury are bound to give full weight to the presumptions so explained; and, lastly, the court alone, without the intervention of the jury, may draw the proper legal inferences whenever the requisite facts are developed in the pleadings." In an earlier section Judge Taylor has quoted in substance, and almost literally, from 1 Greenleaf on Ev., § 33, relating to disputable presumptions, saying: "The connection, however, in this class is not so intimate, or so uniform, as to be *conclusively* presumed to exist in every case; yet it is so general that the law itself, without the aid of a jury, infers the one fact from the proved existence of the other, in the absence of all opposing evidence. In this mode *the law* [italicized in the text] defines the nature and amount of the evidence which is sufficient to establish a prima-facie case, and *to throw the burden of proof on the other party;* and if no opposing evidence is offered, the jury are *bound* to find in favor of the presumption." (1 Taylor on Ev., § 95.) To the same effect,

Best quotes the language of "an ancient civilian," Baldus, "Animi legislatoris ad verisimile applicatio, *onus probandi transferens.*" (Best on Ev., § 314, note *g.*) At the page before cited Starkie says, "That to put the law in motion it is, of course, essential that the suitor should establish such a state of things as warrants such legal interference; the law, till that be done, remains quiescent, neither presuming the existence of a right until it be shown to exist by competent means, nor the existence of any fact essential to the right. So, although the law is quiescent until liability be proved, yet *when legal liability has once been established the law does not discharge a party from a legal liability proved to exist, unless such discharge be also established by like means.*" There is added to the 8th Am. ed., by Sharswood, this note: "If the defendant would show matter in avoidance, after a prima-facie case has been made out by the plaintiff, *the burden of proof shifts upon him.*" (Starkie on Ev., 586, 587, and note 1, citing Gray *v.* Gardner, 17 Mass., 188; Attleborough *v.* Middleboro', 10 Pick., 378; Davis *v.* Jenney, 1 Met., 221, and other cases.)

Here, the language was applied to the effort of the claimant to set up a distinct proposition. Certain unlawful acts and omissions were proved, whereby the government had been deprived of its legitimate revenue, accruing to it from the business actually done. Mr. Lilienthal did not deny the acts or omissions, nor that they had this effect, but said (we will assume he so said, though *the record don't show it*) he had no *fraudulent* intent in his doings and failures to do. This was a new proposition, different from the question whether or not they had been done by him. The fraudulent intent is inferable from the act done. (Beals *v.* Clark, 13 Gray, 18.)

As Judge Sharswood said, in Weiss *v.* Penn. R. R. Co., 79 Penn. St., 390, "when the plaintiffs closed their evidence, they had a perfect prima-facie case to go to the jury. * * * The onus of proving contributory negligence was thus clearly cast upon the defendants." (United States Exp. Co. *v.* Bachman, 28 Ohio St., 157; Union Exp. Co. *v.* Graham, 26 Ohio St., 598; Graham *v.* Davis, 4 Ohio St., 362.) So in a multitude of analagous cases the courts have used the same expression, that the burden of proof is shifted or cast upon the defendant, &c. (Yarnell *v.* Anderson, 10 Mo., 624; Kelly *v.* Ford, 4 Iowa, 140; Peck *v.* Hendershott, 14 Iowa, 45; Buzzell *v.* Snell, 25 N. H., 479; Hartford Life Ins. Co. *v.* Gray, 80 Ill., 31; Throckmorton *v.* Rider, 42 Iowa, 86; First Nat. Bank *v.* Hurford, 29 Iowa, 585; Dupont *v.* Downing, 6 Iowa, 178; Swafford *v.* Whipple, Geo. Green, 266; Jewett *v.* Lyon, *id.*, 579; Com. *v.* Boyer, 7 Allen, 306.)

After an enumeration of cases Starkie says: "Hence it is the general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact of which he is supposed to be cognizant." (Starkie on Ev., *590.)

In the last-published work upon evidence, it is stated "as a test admitting of universal application", that "if there is a case made out against a defendant, on which, if the plaintiff should close, a judgment would be sustained against the defendant, then the defendant has on him the burden of proving a case by which the plaintiff's case will be defeated." (1 Wharton on Ev., § 357, citing R. R. Co. *v.* Gladmon, 15 Wall., 406-7, and very many other cases.) In another section he says, "When a presumption of fact exists against a party, the court

may instruct the jury that the burden is on the party to remove the presumption, and that, if he does not, then that the case must, in a civil issue, go against him on such point." (1 Whar. on Ev., § 371, citing Kelly *v.* Jackson, 6 Peters, 631–2, and United States *v.* Wiggins, 14 Peters, 334.)

This instruction was not only justified but required, because the presumption that the natural consequences of an act are in the contemplation of the actor is one of *law*, though a rebuttable one. (Best on Ev., § 305, citing King *v.* Dixon, 3 M. &. S., 15; Haire *v.* Wilson, 9 B. & C., 645; Rex *v.* Sheppard, Russ & Ry., 169; Rex *v.* Farrington, *id.*, 207.)

With reference to such a presumption, Judge Taylor says: "§ 339. On this general rule, that the burden of proof lies on the party holding the substantial affirmative, some *exceptions* have been ingrafted which should be here noted: First, if a *disputable presumption at law* [italicised in text] is in favor of an affirmative allegation, the party who supports the negative must call witnesses to rebut this presumption." (1 Taylor on Ev., § 339; Dugas *v.* Estiletts, 5 La. Ann., 560; Davenport *v.* Mason, 15 Mass., 85; Baalam *v.* State, 17 Ala., 451.) It is left to the jury to say whether or not the state of facts recited existed. They might well be told that if certain acts were done by the defendant they *should* infer a fraudulent intent. (State *v.* Thompson, 19 Iowa, 299; Pilling *v.* Otis, 13 Wisc., 495; Causey *v.* Wiley, 27 Geo., 444.)

Where the government makes out a *prima facie* case the burden is on the claimant to make out a defense, in-

dependently of the act of March 2, 1779, c. 22, § 71 (1 Stats., 678), which Judge Story thought was merely an extension of the rules of common law. (The Short Staple, 1 Gall., 104, 107; The Argo, *id.*, 150, 157; Ten Hhds. Rum, *id.* 191; United States *v.* Hayward, 2 Gall., 499.)

The same may be said of the act of July 20, 1868, c. 186, § 36 (15 Stats., 140), which is the one in force at the time of the trial in the district court, and says, "And in case of the seizure of any distilled spirits found in any one of the places aforesaid, or in transit therefrom, which shall not have been received into or sent out therefrom in conformity to law, or *in regard to which any of the entries required by law to be made in the books of the owner* of such spirits or of the storekeeper, &c., * * * *have not been made* at the time or in the manner required, *or in respect to which the owner or person having possession, control, or charge of such spirits shall have omitted to do any act required to be done, or shall have done or committed any act prohibited in regard to said spirits, the burden of proof shall be upon the claimant of said spirits to show that no fraud has been committed,* and that all the requirements of the law in relation to the payment of the tax have been complied with." (15 Stats., 140.) This is an expansion of the phraseology of the act of July 13, 1866, c. 184, § 45, which declared that "the burden of proof shall be upon the claimant of said [*i. e.*, seized] spirits to show that the requirements of law in regard to the same have been complied with." (14 Stats., 163, § 45.)

Attention has already been called to the fact that it was provided by the act of March 2, 1867, c. 169, § 9 (14 Stats., 474), amendatory of the act of July 13, 1866,

c. 184, "That section ninety be amended by inserting, after the word 'cigars,' and before the first proviso in said section, the words, 'and all proceedings relating to forfeiture and sale of distilled spirits shall apply to tobacco, snuff, and cigars.'" (14 Stats., 474, lines 11 to 14.)

This must include all proceedings between the seizure of the goods and their sale upon condemnation. Their seizure has relation only to proceedings to obtain a forfeiture of them, and their sale is the consummation and fruition of such proceedings. As to all the intermediate steps, then, the proceedings are to be regulated by the same law, whether the goods are liquors or tobacco; and unlawful acts or omissions having been proved, this law casts the burden of proof upon the claimant. It is not only competent but common for the legislature to regulate the evidence, declaring what shall be *prima facie* or conclusive proof. (Cooley's Const. Lim., 367, and cases cited; People *v.* Mitchell, 45 Barb., 208; Hand *v.* Ballou, 12 N. Y. (2 Kern.), 541; Hickok *v.* Tallman, 38 Barb., 608; Howard *v.* Moot, 64 N. Y., 262; Com. *v* Williams, 6 Gray, 1; Delaplaine *v.* Cook, 7 Wis., 54; Lumsden *v.* Cross, 10 Wis., 289; Abbott *v.* Lindenbower, 42 Mo., 162, and 46 Mo., 291; Allen *v.* Armstrong, 16 Iowa, 508; Rich *v.* Flanders, 39 N. H., 323; Fales *v.* Wadsworth, 23 Maine, 555.)

The whole burden of proof, as to this seized tobacco, was upon Mr. Lillienthal upon proof of unlawful omissions and false entries in relation thereto, such as keeping no account of the quantity manufactured, giving incorrect inventories and returns of it, &c. Hence the instruction was more favorable than he had a right to claim, since it was based upon general principles of

law irrespective of this statute, and was *confined to the burden with relation to one particular fact*, and did not, as it properly might, cast upon him the burden of the whole case.

The difference between the instruction given in this case and that held to be erroneous in the action of debt brought by United States *v.* Chaffee (18 Wall., 544-'6), is quite apparent. There the jury were told that suspicious circumstances, requiring explanation, and not explained, would suffice to sustain a verdict of guilty; "*their silence supplied in the presumptions of the law that full proof which should dispel all reasonable doubt.*" (18 Wall., 645, near bottom.) The instruction in that case made the inference to be drawn from *silence* one of law, not of fact. The court not only drew the inference, but declared what weight the jury should give to it; that it should control their verdict; that they *must* infer guilt from *silence*. Here the jury were to ascertain whether or not Lillienthal had been guilty of unlawful acts, removals, and non-payment of taxes, whereby the United States was deprived of its just revenues; if they so found, the law presumed him to intend their natural results of his unlawful acts, and threw on him *the burden of rebutting this particular presumption* in his individual instance, *not the burden of the whole case*; nor of proving innocence of any wrong intention as to the property seized. It was a question of the presumption as to the INTENT *with which things were done;* not whether they were done at all or not—a fact peculiarly within his own knowledge—*and* (so far as appears) *he is never asked, from the first day to the last of this three weeks' trial, what his real intent was!* It was not because he did *not* have able and competent counsel that the question was

omitted; but because they would not either lead him on to perjury or elicit a damnatory reply.

That Chaffee's case does not extend to such presumptions as the finding by the jury of the facts stated in the charge given by Judge Blatchford would raise, see the citation of and comment upon that case in the edition, by May, of Stephen's Digest of Evidence, just published by Little, Brown & Co., page 36, middle, (citing Kelly *v.* Jackson, 6 Pet., 632, per Story, J., and 1 Greenl. on Ev., § 81, e.) The editor there makes the precise distinction drawn by me in this brief before this little book came to my attention, or into the department; but he is in error if he supposes a revenue cause, although for a forfeiture, is a criminal case. We have hereinbefore cited the authority of this court upon that point. (See *ante*, p.)

2. The second branch of the exception, that the jury *might* infer the fraudulent intent from the acts done, and "that his possession of the goods in the suit was with the like intent," is answered by the numerous citations at the commencement of this argument (see *ante*, p.); which were unnecessary, the principle is so obvious to common sense and so well established. The jury were left to draw their own inference.

Where the ground of forfeiture is a future intent with regard to certain articles, we can only judge of and ascertain the unexecuted purpose by the experience of the past—former like dealings—and by the adaptability of the property to the execution of the supposed purpose. If the fraudulent act has been accomplished, that is the subject of punishment, if not too late to inflict it; but

where it is the meditated design that is the ground of forfeiture, there can be no other way to discover and establish its existence except that above indicated. Thus it is ascertained whether or not liquors are intended for illegal sale, implements for a burglarious use, vessels for the slave or other contraband trade, &c. (Wood *v.* United States, 16 Peters, 360; Taylor *v.* United States, 3 Howard, 197; Buckley *v.* United States, 4 Howard, 251; Castle *v.* Bullard, 23 Howard, 186; Com. *v.* Stoehr, 109 Mass., 365; Com. *v.* Dearborn, *Id.*, 369, 370; State *v.* Plunkett, 64 Maine, 534, 538; State *v.* Wentworth, 65 Maine, 234; State *v.* Colston, 53 N. H., 483; State *v.* Bonney, 39 N. H.; Broom's Philos. of Law, 225; Bottomley *v.* United States, 1 Story, 144; Paryntha Davis, 1 Cliff., 532; United States *v.* High Wines, 7 Blatchfd., 470–'4; Kost *v.* Bender, 25 Mich., 515.)

In Massachusetts the bare having in possession certain implements—which are also adapted to and often engaged in lawful occupations—with intent that they shall be burglariously used by *anybody*, is an offense. (Mass. Gen. Stats., c. 161, § 34.)

Such testimony indicates that a line of conduct or a particular course of business has been deliberately adopted. "For general and broad reasons, in a case like this, involving a charge of fraud, the admission of acts done before any rights of the appellees had supervened, which tended to illustrate the conduct of the parties and develop the truth of their relations, was amply justified by recognized and accepted rules." (Craig's Ap., 77 Penn. St., 460, top.)

Consequently, facts which took place subsequently to a transaction, as well as before, may be taken into con-

sideration for the purpose of ascertaining the intent of the parties to that transaction. (Childress *v.* Ford, 18 Misc. (10 Sm. and Mar.), 25; Williams *v.* Woodman, 8 Pick., 79; Lovell *v.* Briggs, 2 N. H., 218; Long *v.* State, 1 Swan, 288, bottom.)

In short, there can be no inflexible rule as to the precise character nor as to the amount of evidence adduced to establish fraud. Items which by themselves would be so slight and inconclusive as hardly to be material may cumulatively have great probative force. (The Slavers (Sarah), 2 Wall., 366; Castle *v.* Bullard, 23 Howard, 187; Isla de Cuba, 2 Cliff., 301; Kendall *v.* Hughes, 7 B. Mon., 368; Colquitt *v.* Thomas, 8 Geo., 268, § 3; Reed *v.* Noxon, 48 Ill., 323; Stebbins *v.* Miller, 12 Allen, 591; Kinzer *v.* Mitchell, 8 Penn. St., 64; Kaine *v.* Weigley, 22 Penn. St., 179.) In this last cited case, Black, C. J., makes some very forcible remarks about the means of proving fraud, and upon the oft-repeated statement that it is never to be presumed: "It is said that fraud must be proved and is never to be presumed. This proposition can be admitted only in a qualified and very limited sense. But it is often urged at the bar, and sometimes assented to by judges, as if it were a fundamental maxim of the law, universally true, incapable of modification, and open to no exception; whereas it has scarcely extent enough to give it the dignity of a general rule; and, as far as it does go, it is based on a principle which has no more application to frauds than to any other subject of judicial inquiry. It amounts but to this: that a contract [or a transaction] honest and lawful on its face must be treated as such until it is shown to be otherwise by evidence of some kind, either positive or circumstantial.

It is not true that fraud can *never* be presumed. Presumptions are of two kinds, *legal* and *natural*. Allegations of fraud are sometimes supported by one and sometimes by the other, and are seldom, almost never, sustained by that direct and plenary proof which excludes all presumption. A sale of chattels without delivery, or a conveyance of land without consideration, is conclusively presumed to be fraudulent as against creditors, not only without proof of any dishonest intent, but in opposition to the most convincing evidence that the motives and objects of the parties were fair. This is an example of fraud established by mere presumption of law. A natural presumption is the deduction of one fact from another. For instance, a person deeply indebted, and on the eve of bankruptcy, makes over his property to a near relative, who is known not to have the means of paying for it. From these facts a jury may infer the fact of a fraudulent intent to hinder and delay creditors. A presumption of fraud is thus created, which the party who denies it must repel by clear evidence, or else stand convicted." (22 Penn. St., 183.) The remaining paragraphs of the opinion are worthy of reproduction, but this brief is already too voluminous.

VI.

The last requests and exceptions presented by claimant related to the rate at which the "extra-long smoking-tobacco," as manufactured by him, was legally taxable.

The propositions were, in substance, that (1) if at least as much stem was replaced with the leaf as it originally contained, the tax was fifteen cents a pound under

the act of July 13, 1866, c. 184, § 9 (14 Stats., 133, middle), at which rate it was returned; (2) that if it was made in *any* "part of stems," it was properly so returned. (Record, 39, lower half, and 40, top).

It will be remembered that the above mentioned statutes imposed "on smoking-tobacco, sweetened, stemmed, *or* butted, a tax of forty cents per pound. On smoking-tobacco of all kinds not sweetened, *nor* stemmed, *nor* butted, including that made of stems, or in part of stems, *and imitations thereof*, a tax of fifteen cents per pound." (14 Stats., 133, middle.)

That this "extra-long smoking-tobacco" of Mr. Lilienthal's had been subjected to a process whereby it had been stemmed and butted is not denied. (Record, 9, folio 20; 10, folio 22; and *ante*, 3 to 6.) It was physically impossible ever to restore it to the condition of being "not stemmed nor butted." After being stemmed or butted, it might be mixed in a mass with stems or butts; but that would not make it unstemmed or unbutted. Not all the King's horses, nor all the King's men, could accomplish that feat, any more than they could restore a broken egg.

The plaintiff's claim, and the answer thereto, upon this branch of the case, are so fully stated in the opinion of Judge Blatchford, denying the motion for a new trial, that we will quote his language *in extenso:*

"It is contended, for the claimant, that this tobacco was made partly of leaf and partly of stems, all chopped up together, not sweetened, and put up and sold as smoking-tobacco, the stems having undergone a secret process of dyeing to assimilate them in color to the leaf; that, as it was made in part of stems, it was, under the ninety-fourth section of the act of June 30, 1864, as

amended by the ninth section of the act of July 13, 1866 (14 U. S. Stat. at Large, 133), subject to a tax of only fifteen cents per pound; and that the claimant violated no law in returning such tobacco for tax at fifteen cents per pound. If the lawful rate of tax on such tobacco from and including August 1, 1866, to and including January 1, 1868, embracing the period during which the claimant returned it at fifteen cents per pound, was greater than that rate, it follows that there was not, in the instruction, any error prejudicial to the claimant.

"Under the ninety-fourth section of the act of June 30, 1864, as amended by the first section of the act of March 3, 1865 (13 U. S. Stat. at Large, 477), these were the taxes on manufactured tobacco other than snuff, cigars, and chewing-tobacco: 'On * * * all * * * kinds of manufactured tobacco, not herein otherwise provided for, forty cents per pound. On tobacco twisted by hand, or reduced from leaf into a condition to be consumed, without the use of any machine or instrument, and without being pressed, sweetened, or otherwise prepared, thirty cents per pound. * * * On smoking-tobacco of all kinds, and imitations thereof, not otherwise herein provided for, thirty-five cents per pound. On smoking-tobacco made exclusively of stems, and so sold, fifteen cents per pound.'

"Under those provisions, this 'extra-long smoking-tobacco' was subject to a tax of 35 cents per pound. The act made the tax only 15 cents per pound on smoking-tobacco made exclusively of stems, made of the inferior part of the tobacco-leaf, and having none of the leaf part in it, while on all other manufactured tobacco it imposed taxes of 30, 35, and 40 cents per pound. The same distinction is found in the ninety-fourth section of

the act of June 30, 1864, as originally enacted (13 U. S. Stat. at Large, 270), where smoking-tobacco made exclusively of stems is taxed 15 cents per pound, and all other manufactured tobacco has taxes imposed on it of 25 and 35 cents per pound; and in the seventy-fifth section of the act of July 1, 1862, as amended by the first section of the act of March 3, 1863 (12 U. S. Stat. at Large, 717), where smoking-tobacco prepared with all the stems in or made exclusively of stems is taxed 5 cents per pound, and all other manufactured tobacco 15 and 20 cents per pound; and in the seventy-fifth section of the act of July 1, 1862, as originally enacted (*Id.*, 463), where smoking-tobacco made exclusively of stems is taxed 2 cents per pound, smoking-tobacco made with all the stems in 5 cents per pound, and all other manufactured tobacco 10, 15, and 20 cents per pound.

"Such was the course of legislation on this subject. The ninth section of the act of July 13, 1866 (14 U. S. Stat. at Large, 133), further amended the ninety-fourth section of the act of June 30, 1864, by providing that on and after the 1st of August, 1866, the following should be the taxes on manufactured tobacco: 'On snuff, manufactured of tobacco, or any substitute for tobacco, * * * 40 cents per pound. On * * * all * * * kinds of manufactured tobacco, not herein otherwise provided for, * * * 40 cents per pound. On tobacco twisted by hand, or reduced from leaf into a condition to be consumed without the use of any machine or instrument, and without being pressed, sweetened, or otherwise prepared, and on fine-cut shorts, * * * 30 cents per pound. On fine-cut chewing-tobacco, whether manufactured with the stems in or not, or however sold, * * * 40 cents per pound. On smok-

ing-tobacco, sweetened, stemmed, or butted, * * * 40 cents per pound. On smoking-tobacco, of all kinds, not sweetened, nor stemmed, nor butted, including that made of stems, or in part of stems, and imitations thereof, 15 cents per pound.'

"In these provisions there is the same indication of an intention to tax at a low rate tobacco either made wholly of stems or having in it all its natural stems, and to tax all other tobacco at a higher rate, the former being taxed at 15 cents per pound, and all other manufactured tobacco being taxed at 30 and 40 cents per pound.

"This 'extra-long smoking-tobacco,' being manufactured tobacco, was, if not otherwise provided for in the act, taxable at 40 cents a pound. So, also, if it was smoking-tobacco stemmed or butted, it was taxable at 40 cents a pound.

"It is insisted by the claimant that, having some stems in it, and not being sweetened, it was taxable at 15 cents a pound, on and after August 1, 1866. The bill of exceptions shows that the mode of making this 'extra-long smoking-tobacco' was to take the entire tobacco-leaf and remove from it from one-half to three-fourths in length of the woody central stem that runs through the leaf from end to end, so as to leave in the leaf at its top not enough stem to be noticeable in the product after cutting, and then to cut up together the residuary leaf with stems previously soaked in a certain dye-stuff without being sweetened. Prior to August 20, 1866, for several years, the proportion of such residuary leaf to such dyed stem was seven pounds of the former to two pounds of the latter, and after that date the proportion of such residuary leaf to such dyed stem was two pounds of the former to one pound of the latter. It having

been ascertained, by experiment, that the average proportion, by weight, of the butts or portions of stem extracted from the leaf in making this tobacco was one-fourth of the weight of the entire leaf, it was intended, in making this tobacco, after August 20, 1866, to cut up, with a given weight of the residuary leaf, at least as much dyed stems as would equal in weight the average quantity of stems taken out of the leaf. *When ready for sale, the stem was not distinguishable from the leaf.* In the understanding of tobacco-manufacturers, leaf-tobacco is 'stemmed' when the whole of the central stem has been removed from the leaf; and it is 'butted' when the thick end or lower portion of the stem is drawn out of the leaf, leaving more or less of the upper part of the stem still in the leaf. It was not practicable, in the process actually employed by the claimant, to restore or replace the identical portions of stem extracted from the leaf. All of such tobacco returned by the claimant for August, 1866, after the 20th, and for the sixteen succeeding months, was returned by him as liable to a tax of 15 cents per pound, under the act of July 13, 1866, and was classified, in the returns, as 'smoking-tobacco not sweetened, stemmed, or butted, including that made of stems,' and he paid taxes on it at that rate only.

"The contention, on the part of the claimant, is, that the statute says that smoking-tobacco, made in part of stems, that is, smoking-tobacco having in it some stems, and not sweetened, shall pay a tax of only 15 cents per pound; that this tobacco had some stems in it, and, therefore, was made in part of stems, and was not sweetened; and that, consequently, it was liable to a tax of only 15 cents per pound. It is urged for the claimant that it is immaterial, under the statute, whether the

identical stems were put back with the residuary leaf, or whether an equal quantity of stems was put back with it, or whether the same proportion was maintained in the ultimate product between stem and leaf that existed in the tobacco as grown; and that, as long as the tobacco is not sweetened, and is smoking-tobacco, and is made wholly of stems, or partly of stems and partly of leaf, it is within the 15 cents a pound clause.

"An analysis of the provisions of the statute will aid in ascertaining its meaning. The words 'on smoking-tobacco, sweetened, stemmed or butted, a tax of 40 cents per pound,' mean 'on smoking-tobacco manufactured from leaf-tobacco which has been sweetened or stemmed or butted, a tax of 40 cents per pound.'

"The words 'on smoking-tobacco of all kinds not sweetened, nor stemmed, nor butted, * * * a tax of 15 cents per pound,' mean 'on smoking-tobacco manufactured from leaf-tobacco which has not been sweetened, and has not been stemmed, and has not been butted, * * * a tax of fifteen cents per pound." This last clause embraces also smoking-tobacco 'made of stems, or in part of stems and imitations thereof.' This 'extra-long smoking-tobacco" was made from leaf-tobacco which had been butted, stems separately prepared being afterward added to the residuary leaf. As smoking-tobacco manufactured from butted leaves, it was within the 40-cents-a-pound clause. If it had no separate stems added to the residuary leaf, but had been made solely of the residuary leaf left after butting, it would have had in it at least one-quarter in length of the central stem left in the leaf after butting, and thus would have been made 'in part of stems,' and so been subject to the 15-cents-a-pound clause, under the reading of that clause con-

tended for by the claimant, although, being smoking-tobacco merely butted, it would clearly have been within the 40-cents-a-pound clause. A construction of the 15-cents-a-pound clause, which would put such butted tobacco within that clause, when it is manifest the intention was that it should be solely in the 40-cents-a-pound clause, cannot be admitted if both clauses are capable of such a construction as will not allow any one article to fall within both of them. I think that the 40-cents-a-pound clause as to smoking-tobacco manifestly includes all smoking-tobacco in which sweetened leaf is a constituent, and all in which stemmed leaf is a constituent, and all in which butted leaf is a constituent. In direct contradistinction to this, the 25-cents-a-pound clause says that smoking-tobacco made of tobacco-leaves in their natural state as to stem and leaf, and not at all sweetened, and in which stemmed leaf is not a constituent, and in which butted leaf is not a constituent, shall pay only 15 cents a pound tax. It will not do to go outside of the plain language of the statute to open wide a door to fraud by saying that you may butt the leaves, and then restore other butts equal in quantity to the removed butts, and call the product tobacco not butted; or stem the leaves, and then restore other stems equal in quantity to the removed stems, and call the product tobacco not stemmed. The stem is the least valuable part of the tobacco. It is allowed to be cut up in and with and as a part of the leaf, as it grew, as smoking-tobacco at the low rate of tax. If it is so cut up there is sure to be in the product a certain average quantity of stem. If the stem or butt is allowed to be removed, what is left becomes at once more valuable than the whole was, and liable to the 40-cents-a-pound

tax; and it cannot for a moment be supposed that Congress intended that the putting back a part of the removed stem or butt should reduce the tobacco to the 15-cents-a-pound clause, *while the manufacturer would be able to impose on the public by selling the product as one of a quality taxable at 40 cents a pound.*

"In view of these considerations, and in harmony with them, an interpretation can be given to the words, 'including that made of stems, or in part of stems, and imitations thereof,' entirely consistent with the language, and not open to the objection of including within the 15-cents-a-pound clause smoking-tobacco already clearly put into the 40-cents-a-pound clause. The stems being the least valuable part, Congress first provided, in the 15-cents-a-pound clause, that smoking-tobacco made by cutting up the natural leaf, and therefore including all the stem which grew in the leaf, should pay only 15 cents a pound. It then passed to an inferior grade of smoking-tobacco, by providing that smoking-tobacco made wholly of stems, without any admixture of leaf, should pay only 15 cents a pound. It then passed to a still lower grade, by providing that smoking-tobacco made, as to part of it, of tobacco-stems, and as to the rest of it of imitations of tobacco-stems, should pay only 15 cents per pound. If the words 'in part of stems' are to be so construed, as contended by the claimant, as to put into the 15 cents-a-pound clause smoking-tobacco having but a small quantity of stem in it, and the rest nearly all pure leaf, making a product nearly equal, perhaps, in quality, to stemmed leaf, paying 40 cents a pound, we not only have Congress opening the way to the government's being defrauded readily of 25 cents a pound on large quantities of smoking-tobacco, but we

have it making an enactment which allows, as said before, smoking-tobacco made of butted leaf, and having in it some stems, to be within both the 40-cents-a-pound clause and the 15-cents-a-pound clause. The words 'in part of stems and imitations thereof' would naturally indicate a lower grade of tobacco than that 'made of stems,' whereas, on the interpretation contended for by the claimant, a grade of tobacco nearly up to pure stemmed leaf may be included in the words 'in part of stems.' The words 'in part of stems and imitations thereof' have no other meaning than if they read 'of stems in part and imitations thereof,' that is of stems partly, and as to the rest of the constituents, of imitations of stems; and no other meaning than if they read 'in part of stems and in part of imitations thereof.' The words are not happily chosen, but it is not possible, in my judgment, to give them a meaning which would allow this 'extra-long smoking-tobacco' to have been subject to any other tax than that of 40 cents a pound.

"Not only is this construction in harmony with the prior legislation of Congress in regard to manufactured tobacco, but subsequent legislation confirms these views. The sixty-first section of the act of July 20, 1868 (15 U. S. Stat. at Large, 153), imposes a tax of 16 cents per pound 'on all smoking-tobacco exclusively of stems, or of leaf with all the stems in, and so sold, the leaf not having been previously stripped, butted, or rolled, and from which no part of the stems have been separated by sifting, stripping, dressing, or in any other manner, either before, during, or after the process of manufacturing; on all fine-cut shorts; the refuse of fine-cut chewing-tobacco which has passed through a riddle of thirty-six meshes to the square inch, by process of sifting, and on

all refuse scraps and sweepings of tobacco;' and on all other manufactured tobacco and snuff a tax of 32 cents per pound.

"The court charged the jury that it was not necessary to determine what was the proper interpretation of the 15-cents clause in the act of 1866, or under what head in that act the 'extra-long smoking-tobacco' fell. It also charged the jury, in accordance with the first proposition on the part of the claimant, that if they should believe that the returns for taxation of the 'extra-long smoking-tobacco' between August, 1866, and the date of seizure were made in good faith, and with an honest belief, on the part of the claimant and his agents concerned in the preparation of said returns, that said tobacco was liable to the 15-cents rate of duty, and to no other or higher rate, then, even though said tobacco was, by law, liable to the 40-cents rate of duty, the jury could not, for that cause, find a verdict for the government, under section 48. But the court refused to charge, as requested by the claimant, that the 'extra-long smoking-tobacco,' if composed of both stem and leaf, or if made in part of stems, or if it contained a quantity of stem as great as, or greater than, that which grew with the leaf contained in said tobacco, was liable to a tax of only 15 cents per pound. Although it may have been erroneous to charge the jury, as was done in substance, that it was immaterial to any issue in this case what was the lawful rate of tax on the 'extra-long smoking-tobacco,' yet as such lawful rate was, in fact, 40 cents a pound, the error, if any, was prejudicial only to the government, and not to the claimant, and it was not erroneous to not instruct the jury that the lawful rate

of tax payable on such tobacco was 15 cents per pound." (6 Bend., 90 to 98.)

It will be noticed that this act *increased* the tax "on smoking-tobacco, sweetened, stemmed, or butted," leaving that on stems, &c., at the old rate. It cannot fairly be contended that Congress proposed to reduce the tax, by allowing a large quantity of tobacco, which was before classified under the higher rate, come in at a reduced rate. It is significant that, notwithstanding all his illumination from Senatorial and other advisers, Mr. Lillienthal at first acted upon the construction of the law now declared to be correct; and his attempted evasion was an afterthought. Nor did he communicate to the revenue officers the actual *modus operandi;* nor could he succeed in his pretense that the course he pursued was with their concurrence. In the second instruction given at the district attorney's request, the jury were distinctly told that they were *authorized* to infer fraud from this transaction *only* in case they found "that no officer of internal revenue was advised by C. H. Lillienthal or his agents of the said practice of returning the said extra-long smoking-tobacco for taxation at fifteen cents a pound; that the Commissioner of Internal Revenue had published his instructions and opinion that tobacco so manufactured was subject, under said act of 1866, to the tax of forty cents a pound as smoking-tobacco, and *never directly or indirectly countenanced or sanctioned the practice of C. H. Lillienthal*, in returning said extra-long smoking-tobacco." (Record, 37; *ante*, .)

It is not necessary to resort to the Commissioner's ruling to determine the true construction in the present case, as was done in Peabody *v.* Stark, 16 Wall., 240; but if recourse were had to that office, it would be found

that it had been distinctly announced that such tobacco was liable to the forty cents tax.

There was no reason for showing it any favor. It was a fraud upon the public as well as upon the revenue. All *imitations* of stems (such as cabbage, &c.) were taxed at fifteen cents. This was an *imitation of leaf-tobacco;* the stem portion being cut out, steeped, and dyed, and then rerolled, so that the customer might not distinguish it from entire leaf; the stems being thus flattened and colored to resemble the leaf. "The result of this process was that when the tobacco was finished for sale the stem which it contained was not distinguishable from the leaf." (Record, 10, lines 22 and 23.) Being made like leaf tobacco, of material stemmed and butted, and *sold as leaf-tobacco, for the price that article brought,* it was taxable as and for the thing which it purported to be.

VIII.

The verdict of the jury was so evidently correct in substance, if not in form, too, that we shall not protract this argument by vindicating at length the refusal to arrest the judgment for this cause. The reasons for it, as stated in 5 Ben., 457 to 468, are sufficient. (Judiciary act of September 24, 1789, c. 20, sec. 32 (1 Stats., 91, top); Roach *v.* Hulings, 16 Peters, 319; Parks *v.* Turner, 12 Howard, 39.)

IX.

After all, as Judge Blatchford supposed, the whole case turned upon the *fact,* to be found by the jury, what Mr. Lilienthal's actual intention was. "This is the only

question presented in the case. It was pressed with considerable zeal by the learned counsel, because (as we suppose) of the large amount involved; but really there seems to be no foundation for the exception, and it cannot be made plainer by discussion." (Smith *v.* Webb, 64 No. Car., 543.)

CORRECTION OF PLAINTIFF'S STATEMENT.

While correcting the proof of the foregoing argument, the brief for the plaintiff in error is put into my hands. In his effort to condense the statement of a voluminous case, counsel has unintentionally fallen into some errors, a few of which will be very briefly noticed.

Near the middle of page 3, it is a mistake to say that the "other facts concerning Lillienthal's business" proved at the trial had "no relation whatever to the property seized." They showed the regular system and course of his business to be to make a large portion of his stock up into "extra-long smoking-tobacco," taxable at 40 cents, and to return it at 15 cents. The relation this fact bore to the seized property was its strong tendency to satisfy the jury that the intention existed to use the tobacco then on hand just as previous stocks had been used.

Upon the next page (4) counsel errs if he supposes that "stemmed and *butted*" means that *the whole* of "the central fiber has been removed," as will be seen by recurring to the definition given by Mr. Lillienthal's foreman, who says that such tobacco is known as "stemmed," whereas it is "butted" if only "*the lower portion*" of the stem is removed. (Record, 10 bottom; *ante*, 6, top.) Lillien-

thal's removal of this part of the stem—the "butting" of the tobacco—was not "a process peculiar to himself," but the precise operation contemplated by law, which taxed the result at the same rate as if stemmed. His peculiarity was to so roll, flatten, color, and manipulate the removed stem as to be able to palm it off upon the public as all leaf, which "is the finest kind." This is the performance that it is claimed should exempt him from the higher rate of taxation, and from any imputation of fraud, and protect him from "a punishment more suitable for a barbarous age than for the nineteenth century." (Page 16.)

At the bottom of page 5 it is erroneously supposed that Mr. Lillienthal's "*transaction*" with the Orinoco tobacco was "*shown* to have been made in pursuance of the advice of members of the Finance Committee of the Senate," &c. The true statement is only that Mr. Lillienthal swore to having received such advice (Record, 14, middle), and the jury evidently did not believe him, it being a matter exclusively for their cognizance. Why they did not credit it can be surmised by recalling matters of public history, viz, that Mr. Fenton was then governor of New York, having been elected in the fall of 1864, and Mr. Fessenden was Secretary of the Treasury, not resuming his seat in the Senate till after the passage of this act! So neither of these gentlemen were then "members of the Finance Committee of the Senate." "Liars should have good memories," the old adage says.

Referring to the clause at the bottom of page 6, we will repeat a suggestion already made, that it was not pretended that the "impracticability" of complying with

the law applied to all tobacco manufacturers, but only to Mr. Lillienthal's "process, peculiar to himself." (See Record, 15, beginning of folio 32; *ante*, 13.) He had no right to adopt a course of business which of itself disenabled him to obey the law. Still, we do not see how the circumstance of the *order* being given before the goods were completely manufactured could affect Mr. Lillienthal's peculiar system of bookkeeping. We are so little of an expert at accounts as to imagine that he might have kept the required account, even if the orders had come in before he had commenced to make the desired articles at all.

That is a grave mistake, at the bottom of page 7, which supposes there was no "claim or pretense whatsoever that any revenue had been lost to the government." (See bill of exceptions; Record 12, folio 26; 16, folios 33 and 34; 19, folio 38; 20, folio 39, top.)

In his 6th and 7th assignment of errors, page 11, the counsel says the court erred in granting the requests of the government which were based upon the hypothesis of a certain state of facts being found by the jury; but the brief does not give the assumption upon which alone the jury were to make any application of the law given them to the case under consideration.

NOTES IN REPLY TO PLAINTIFF'S BRIEF.

We will indicate by adoption of his method of marking the division of his brief the portions to which these notes particularly apply.

A.

1.

We have already cited the State liquor laws, those against the slave trade, the mending or having of burglarious implements, &c., which make the bare possession with intent to make a future unlawful use of the property a crime; so the legislation upon this subject which concerns this case is not the novelty which counsel believes it to be. (See p. 16 of his brief.) In addition to other instances, we will say that, for more than forty years at least, it has been an offense—*working the forfeiture of all the personal property with which the same was found*—to have in possession spirituous liquors, with the *intent* to introduce it into the Indian country, even though found within the limits of a sovereign State. U. S. *v.* Whisky, &c., La Riviere, clmt., 93 U. S., 188, where the liquors found among the goods seized and forfeited were about in the proportion which Falstaff's order for bread bore to his demand for sack. (Act of June 30, 1834, c. 161, § 20, 4 Stats., 732.)

2.

As before noticed, this is a civil suit; (see also State *v.* Liquors, 47 N. H., 369,) therefore the proof is not required to be "beyond reasonable doubt." (See plaintiff's brief, 16, § 2.) Cooper *v.* Slade, 6 Ho. of Lds., 772; Knowles *v.* Scribner, 57 Maine, 497; Ellis *v.* Buzzell, 60 Maine, 209; Folsom *v.* Brown, 25 N. H., 122; Schmidt *v.* Ins. Co., 1 Gray, 529; Gordan *v.* Parmalee, 15 Gray, 413; Washington Ins. Co. *v.* Wilson, 7 Wis., 169; Etna Ins. Co. *v.* Johnson, 11 Bush, 587; Wightman *v.* Ins. Co., 8 Robt. (La.), 442; Scott *v.* Home Ins. Co., 1

Dillon, 107, where the law is correctly and succinctly stated.

But *no instruction was asked upon this point*, and no exception taken fairly applicable to it. Those given were more favorable to the claimant than he was entitled to ask. It is unnecessary to discuss the question whether a perfectly legal act can ever be used as evidence of fraud, because the acts here proved were "utterly illegal"; but we will say that a sale for value, by which title is actually transferred, may be fraudulent, even as to subsequent creditors, if the intention is to defraud them.

3.

The ruling of the Commissioner of Internal Revenue which counsel finds (see his brief, page 18, § 3) in the letter of August 26, 1867, we cannot discover any more than the jury could when it was placed before them for their consideration. To the remarks and citations already made with reference to the proper tax on this extra-long smoking-tobacco, we will add two suggestions more, in response to claimant's counsel. He says, "Lilienthal's mode of manufacture, in first removing and afterward replacing the stem, made no essential difference in the *quality* of the tobacco, and it was in respect to the *quality* that Congress had established the different rates of taxation." (*Ib.*) The italics are his. True, Mr. L.'s peculiar process might or might not make any "essential difference in the *quality* of the tobacco" as a vegetable, but it made, and was especially and solely intended to make, an all-important difference in its quality *as a vendible article;* and it is its quality *as affecting its market value* that Congress considers in establishing the different rates of taxation.

Though the judge did not tell the jury what the legal rate was, yet it was not (as counsel supposes *ubi sup.*) because he thought it subject to the lower rate, for, in his opinion, refusing a new trial, he expressly says the omission was favorable to the claimant, since it was clearly liable to the higher rate.

How hard pressed the claimant's counsel are by the finding of the jury may be inferred from their being driven to indicate a bogus sale as perfectly legal. (See their brief, 19, § 4.) The *dates* of the statute and of the transaction are not in their minds when they speak of it as "no evasion of any existing law," but in "anticipation of intended or *possible future* legislation." (*Ib.*) The statute was approved March 3, 1865, and on that day became the "existing law" of the land, though certain taxes accrued under it on the first of the succeeding month. The "sale," which counsel consider perfectly proper and the court "utterly illegal," took place March 8, 1865. (Record, 13, bottom, *et seq.*)

Why a fraud may not be perpetrated upon legal provisions, that it is known are about to become operative, we do not perceive, as well as upon those whom it is intended may become creditors; or upon the rights about to accrue to a man or woman upon the consummation of a marriage, then only in contemplation when the supposed "sale" is made. Countess of Strathmore *v.* Bowes, 1 Vesey, jr., 22, in 1 Leading Cases in Equity (4th ed., 1876), Pt. I, page *405, with the comments thereon and numerous citations of English and American cases. In either case it is a fraud upon rights about to accrue under existing law.

We have already noticed the "advice" upon which

Lilienthal said he relied, and have nothing more to add to what has already been said upon the other topics discussed in this division of the plaintiff's brief. Judge Blatchford shows very plainly how the context and subject affix different shades of meaning to the word "imposed" in the different clauses of the law. U. S. *v.* Fisher, 2 Cranch, 387, top, where different meaning is given words in fifth section from that assigned in the four preceding.

The idea that a citizen can so waive future contingencies as to pay to-day taxes which may (or may not) accrue during succeeding months or years is hardly thought to need refutation.

5.

The matters discussed by counsel in this division of their brief have been already sufficiently commented upon by me. With those suggestions, which might very well have been addressed to the jury, as to the weight and sufficiency of the testimony, and the inferences of fact to be drawn therefrom, we do not find any occasion to deal. The judgment of the jury was sufficiently informed to lead them to a result satisfactory to their own consciences and that of the court.

B.

In our brief as originally prepared we have discriminated the case at bar from that of Chaffee *v.* United States, 18 Wall., 545, and will add nothing further, except to cite these additional cases and authorities: Josefa Segunda, 5 Wheat., 338; Roscoe on Ev., 14, 18; Rex. *v.* Gordan, Leach Cr. Cas., 515; U. S. *v.* Keene, 5 McLean,

509; U. S. *v.* Armstrong, 2 Curtis, 446; Clements *v.* Moore, 6 Wall., 299.

United States *v.* brig Burdett simply decided a question of fact (ownership) as the syllabus truly states.

Taking the facts proved in this case, that Mr. Lilienthal made a fictitious sale to defeat the effect of the revenue laws; that he adopted a system and course of manufacture which was a fraud upon the public and upon the law; that he omitted to keep the required books and accounts; that he made, sold, and removed goods which were never returned for taxation; we then say, in the language of this court, quoted at the bottom of page 27 of counsel's brief, "if a fair construction of the acts and declarations of an individual (Mr. Lilienthal) do not convict him of an offense," we would be pleased to be instructed how a district attorney can ever convict a man of an *intent* to commit a fraud with property in his possession.

These facts were neither *equivocal* nor *ambiguous;* and as to that of the pretended sale, the actor said that his purpose was to evade the statute.

C.

As to this portion of counsel's argument (pp. 29–31), we will recall attention to the numerous cases, like that of State *v.* Wentworth, 65 Maine, where illegal sales previously made of other liquors are admitted as evidence of the intent as to other liquors, &c.

That month after month, for nearly a year and a half, Mr. Lilienthal had defrauded the public and the revenue with his pressed and dyed manufacture, in a manner which we are happy to be informed was "peculiar to himself," was pretty fair evidence that he purposed to

work up the stock on hand in the same way. That his "acts and omissions" (page 31, top), though fraudulent, were proved to have been done with relation to other goods must necessarily be the case when the unexecuted intent as to those seized is the sole ground of forfeiture. Those as to which it had been executed had long before vanished into thin air from the mouths of consumers.

Instead of it being contrary to natural justice to punish the intent, that (as before observed) is precisely the ingredient which the law considers.

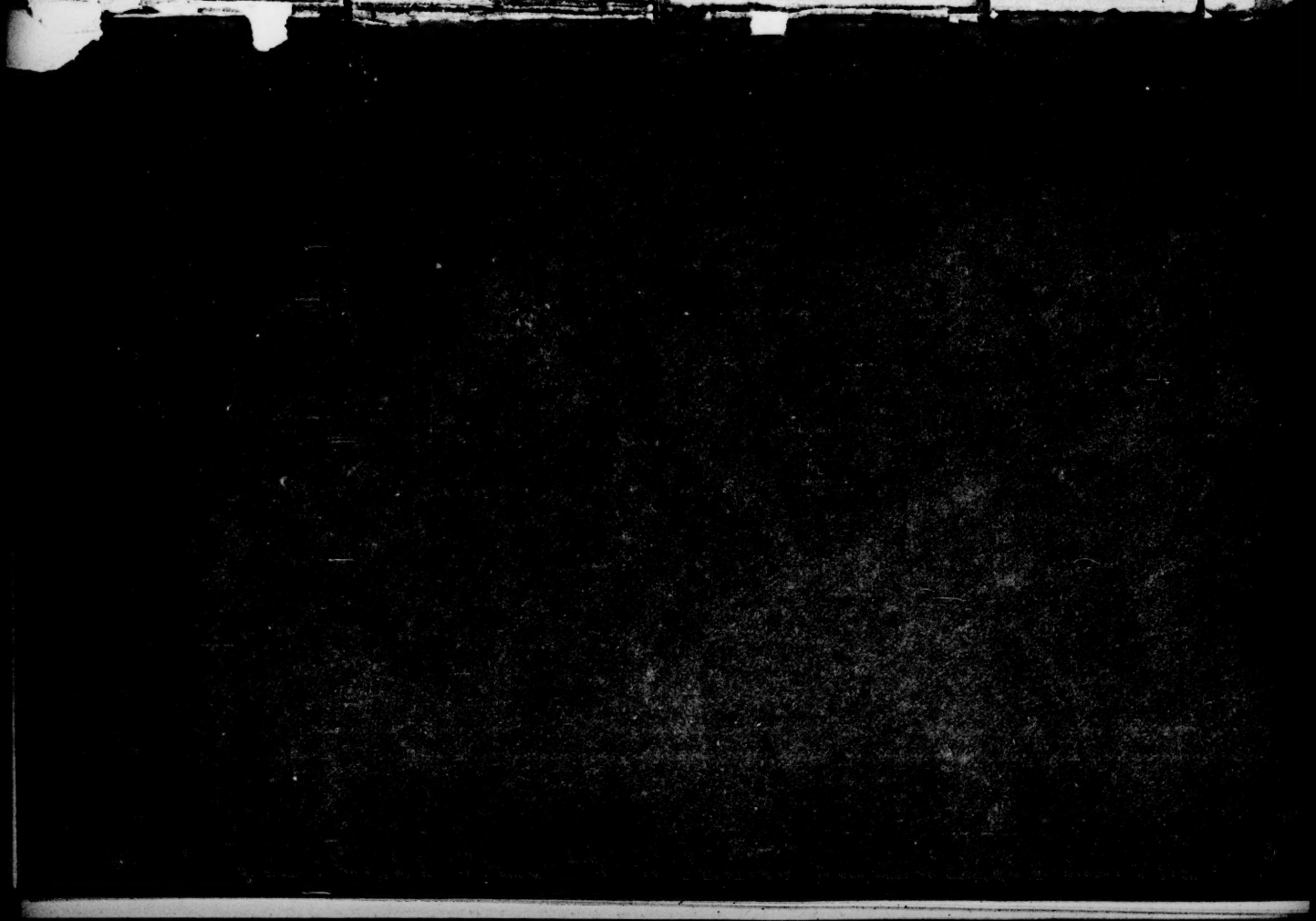
D.

The manner of obtaining evidence has nothing to do with its effect when legitimately introduced into a case. At least, a conviction cannot be set aside because genuine books and testimony were obtained from an unwilling witness; even if "stolen." (Lloyd *v.* Mostyn, 10 M. & W., 482; Leggett *v.* Tollervey, 14 East., 302; Johnson *v.* Lewis, *id.*, 306, note; The Eugenie, 2 Mason, 441; Com. *v.* Dana, 2 Met., 237.)

And Clifford, J., so ruled as to books forcibly taken from defendants, which does not appear to have been the case here; for aught that appears Mr. Lilienthal produced them upon *subpœna*. (Stockwell *v.* U. S., 12 Int. Rev. Rec., 90. See also case in 6 Bissell, hereinbefore cited.)

As the Pennsylvania court observed, in the language already quoted, it hardly looks well for one charged with fraud to complain of excess of proof—especially when it is that furnished by himself, his employés, and his books.

EDWIN B. SMITH,
Assistant Attorney-General.



In the Supreme Court of the United States.

No. 137.

CHRISTIAN H. LILIENTHAL,

Plaintiff in Error,

Vs.

THE UNITED STATES.

In Error to the Circuit Court of the United States for the Southern District of New York.

R. T. MERRICK,
M. F. MORRIS,
For Plaintiff in Error.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1877.

No. 137.

CHRISTIAN H. LILIENTHAL, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

Error to the Circuit Court of the United States for the Southern District of New York.

The petition of Christian H. Lilienthal, the plaintiff in error in the above entitled cause, respectfully shows:—

That this cause came on for argument at the present term of the Court, and was argued and submitted by counsel, and a decision was rendered therein affirming the judgment of the court below against this petitioner.

That this petitioner is advised and respectfully submits, that in the said decision certain provisions of law were inadvertently overlooked by the court; and he believes that, on a further consideration of the case, the court would render a different decision. He therefore respectfully submits the following reasons for a re-argument and reconsideration of the case:

1st. The opinion of the court was that, this being a proceeding *in rem*, and not *in personam*, was not a criminal prosecution in the sense that the burden of proof might not be shifted from the Government to the claimant; and that the presumption of innocence does not apply in this case so as to compel proof of the plaintiff's case beyond a reasonable doubt.

It is true that, in revenue seizures generally, the proceeding is regarded as a civil proceeding as far as the claimant is concerned, because the thing seized is itself the guilty thing, being found under circumstances prohibited by law, and the burden of proof in such cases, after probable cause shown for the seizure, is shifted by special statutory provision from the Government to the claimant. (*Cliquot's Champagne*, 3 Wallace, 145.) And all the decisions upon the subject, under which the burden of proof was so shifted, were made under this statutory provision, namely, the 71st section of the act of March 2, 1779. (1 Stats., p. 678.)

While it has been generally held, without much foundation in reason or justice, that a proceeding *in rem* is a civil, and not a criminal proceeding, although its effect is often to punish the individual more severely than any penal statute, and always results in a greater privation of property than do proceedings instituted upon statutes authorizing suits for the recovery of statutory penalties, which, although civil in have form, always been ~~constituted~~ construed as penal in their nature, yet it appears that there is good authority for the distinction that a proceeding *in rem* is to be considered a civil action when *the gravamen of a charge is the violation of law by means of the very thing seized*, or the guilty intent communicated to

it, and in the actual accomplishment of which it is engaged or employed at the time of seizure, but that such a proceeding, though nominally *in rem*, is to be considered a criminal action, when the guilty intent of the owner is the pivot upon which the case turns; for in such a case the forfeiture is not of a guilty thing, but a forfeiture by reason alone of *the crime of the owner of a thing not yet used for any guilty purpose.* The holding of property, the possession of which in itself is lawful and proper, with *intent* to commit at some future day a violation of law therewith, is a very different thing from the illegitimate use of property and its actual employment in the violation of law. The property in the latter case may be forfeited, whatever be the intention of the party, because the employment itself is illegal; but in the former case the intent of the party is the *only* thing to be put in issue, as there is no overt act, and that intent must necessarily be proved to be a guilty and illegal intent. In other words, the party must, necessarily, in such a proceeding be convicted of a criminal offense, just as in the proceeding for the recovery of a statutory penalty.

Bishop's Criminal Law, 4th Ed., Vol. 1, Sec. 702–709, 833, 864.

1 Curtis C. C. Rep., p. 331, Greene *vs.* Briggs.

Fisher *vs.* McGirr, 1 Gray, 1.

The majority of the decisions are to the effect, that suits upon forfeitures are all in the nature of criminal proceedings.

Clifton *vs.* United States, 4 Howard, 242.

United States *vs.* 84 Boxes of Sugar, 7 Peters, 453.

The rule by which to determine whether a revenue act is a criminal statute or not, is, that when the act forfeits other than the *offending* property, it is a criminal statute; but when it forfeits only the *offending* property, it is not a criminal statute.

United States *vs.* The Malek Adhel, 2 Howard, 233.

Now, if the proceedings in the present case are necessarily of a criminal character, inasmuch as they turn entirely upon the innocent or guilty intent of the claimant, the rules of law governing criminal proceedings must apply, as in the case of United States *vs.* Chaffee, 18 Wallace, 536, and in that of The United States *vs.* The Brig Burdette, 9 Peters, 691.

In the case last cited, the Court, in full view of the act of 1799, herein beforementioned, said: "The object of the prosecution against 'The Burdette' is to enforce a forfeiture of the vessel and all that pertains to it, for a violation of a revenue law. This prosecution, then, *is a highly penal one*, and the penalty should not be inflicted unless the infractions of the law shall be established *beyond reasonable doubt.*" That case did not turn upon a preponderance of evidence. The Court most pointedly and distinctly announced the doctrine in that case, that "no individual should be punished for a violation of law which inflicts a forfeiture of property, unless the offense shall be established *beyond reasonable doubt.* This is the rule which governs a jury in all criminal prosecutions, and the rule is no less proper for the government of the Court *when exercising a maritime jurisdiction.*" That is to say a maritime jurisdiction

such as was then being exercised and under circumstances similar to those of the case then before the Court.

That was a case of revenue seizure and a proceeding *in rem*, on account of an alleged irregularity in the registration of the vessel; and the petitioner respectfully submits that the decission in that case is directly and positively at variance with the opinion heretofore pronounced in this cause. And if this opinion is to stand, that decision must be considered as overruled and no longer as the law of this Court.

The case of Chaffee *vs.* The United States was, it is true, a proceeding *in personam*, to which, according to the admissions of the opinion in the present case, the rule is applicable that the case of the prosecution must be proved *beyond reasonable doubt;* and yet it was only a civil cause, a civil suit for the recovery of a statutory penalty, and with as few of the elements of a criminal proceeding as it is possible to suppose in such a case. It is very difficult to see why the statement contained in the opinion in the present case would not have been applicable to that suit also. The statement referred to is as follows:

"Speaking of a proceeding *in rem* to forfeit spirituous liquors, the supreme court of New Hampshire say, that it is only when *some crime or misdemeanor is charged upon an individual* that all reasonable doubt of the guilt of the accused must be removed, but here no one is accused of any crime, as it is not a proceeding against any person. Such being the character of the proceeding and the character of the trial, the claimant may appear by attorney, may make and sign his claim by attorney, may file his plea in writing and sign it by attorney; issues may be joined, claims and pleas amended, verdict rendered on the issues, judgment ren-

dered on the verdict, costs allowed the prevailing party, and execution for costs issued."

Each and all of these incidents characterized the proceedings in the case of Chaffee *vs.* The United States; and hence it does not appear where the difference exists between this case and that. If it is to be the law that the whole of a man's property may be forfeited *upon mere presumption* by calling the proceeding against him a proceeding *in rem*, and yet that he is not to be subjected to the risk of a petty judgment against him for a trifling penalty under the form of a civil proceeding *in personam*, without the adduction of proof *beyond reasonable doubt*, the safeguards of the law have become a mere mockery, and it is in the power and caprice of the legislature at any time to destroy all the securities under which we hold our property by designating the proceedings against the citizen proceedings *in rem*. It is respectfully submitted that calling a thing by a certain name does not make it such; and the petitioner is advised that it is the immemorial usage of courts of justice to look behind the forms in order to ascertain the substance.

The petitioner respectfully suggests that the distinction between proceedings *in rem* and proceedings *in personam*, as far as it has any just warrant for its existence, was intended to apply to proceedings against property and *criminal* proceedings against the person, the issue of which might be the restraint of individual liberty, and was intended in the latter case to enforce stricter proof of the offense *in favorem vitæ et libertatis*. There is no reason for the existence of any such distinction in reference to proceedings for the mere

forfeiture of property, whether the proceeding is directly against the property or directly against the person, when the ultimate result is the same in both cases, viz.: a judgment whereby the individual loses a certain specified portion of his property; and the petitioner submits that an examination of the authorities on the subject will show that no such distinction exists. While it is true and proper that revenue laws, unlike ordinary criminal laws, should be construed liberally and fairly to carry into effect the intention of the Legislature for the general welfare, it is equally true from all the authorities—in the absence of any statutory provision shifting the burdens of proof—that all forfeitures are more or less criminal in their character, and that the unchangeable rule of law in their enforcement, whether the proceeding be *in rem* or a civil proceeding *in personam*, is that the offense—for there is offense in both cases—should be proved *beyond reasonable doubt*, and that there is no room in either case for mere preponderance of evidence as in ordinary civil suits.

In the case of Fisher *vs.* McGirr, (1 Gray, 1,) Chief Justice Shaw, delivering the unanimous opinion of the ablest court that ever occupied the supreme bench of Massachusetts, has laid down the law on this subject with the clearness and ability characteristic of him:

"Although crimes and offenses," he says, "punishable by law, consist in acts done, and not in mere unexecuted purposes and intentions, yet the more effectually to accomplish the great and salutary purpose of laws necessary to the well-being of society, acts and conduct, which would be innocent or indifferent in themselves, are often declared unlawful, and made punishable, if done

"with an intent and purpose, which will render them nox-
"ious and dangerous, and where, should the law wait until
"the criminal intent is carried out into action, irremediable
"mischief will be done. The law is preventive as well as
"remedial. * * * * *
"This system of measures seems designed to accomplish
"this one purpose by two distinct modes or courses of pro-
"ceeding, both well known to the law, but of considerable
"difference in their mode of operation; the one a proceed-
"ing *in rem*, by the sequestration and forfeiture of the
"property or thing, which is noxious in itself or made the
"instrument of a noxious and injurious use; the other a
"proceeding *in personam* for the punishment of the person
"of the offender, as an example to deter others from the
"commission of the like offense. *Both are proceedings de-*
"*signed for the enforcement of the criminal law, and must be*
"*governed by the rules applicable to its administration.*

"We have no doubt that it is competent for the legisla-
"ture to declare the possession of certain articles of prop-
"erty, either absolutely, or where held in particular places,
"and under particular circumstances, to be unlawful, be-
"cause they would be injurious, dangerous or noxious; and
"by due process of law, by proceedings *in rem*, to provide
"both for the abatement of the nuisance and the punish-
"ment of the offender, by the seizure and confiscation of
"the property. * * *

"The case of goods smuggled, in violation of the revenue
"laws, and the confiscation of vessels, boats, and other
"vehicles, subservient to such unlawful acts, are instances
"of the application of law to proceedings *in rem.*

"The theory of this branch of the law seems to be this:
"That the property of which injurious use is made, shall be
"seized and confiscated, because it is so unlawfully used.
"* * * Besides, the actual seizure of the property,
"intended to be offensively used, may be effected, when it

"would not be practicable to detect and punish the offender "personally."

* * * * * *

"Supposing the process *in rem*, when rightly conducted, "to be a suitable and proper mode of enforcing obedience "to a useful and salutary law, *it does it by punishing the "offender*, who must be the owner, or some person interested "with the possession by him, or some person for whose un- "lawful possession of it the owner is responsible; it does "this by depriving such owner of his property, at the same "time preventing the further noxious and unlawful use of it. "Such being the character of the prosecution, in a high "degree penal in its operation and consequences, *it should "be surrounded with all the safeguards necessary to the security "of the innocent*, having the full benefit of the maxim, that "every person shall be presumed innocent until his guilt "be established by proof. He should have notice of the "charge of guilty purpose, upon which his property is de- "clared to be unlawfully held, and in danger of being for- "feited, and a time and opportunity to prepare his defence, "an opportunity to meet the witnesses against him face to "face, *and the benefit of the legal presumption of innocence.*"

The case of The United States *vs.* The Burdette, (9 Peters, 691,) was a proceeding *in rem*, commenced on information, precisely like the present case, and presenting suspicious circumstances to a much greater degree than the present case. The precise point decided in that case was that cases *involving the forfeiture of property must be proved beyond a reasonable doubt;* and that the court exercising a maritime jurisdiction must be guided by the rules that govern a jury in all criminal prosecutions. The suspicion of fraud was strong in that case; *the preponderance of evidence was largely in favor of the prosecution;* and yet the court held that the facts must

be proved *conclusively.* "Admitting," the Opinion says, "the facts which have been stated, as creating *suspicion*, are "they *conclusive?*" This very case of The Burdette, when analyzed in connection with the law, shows very plainly the propriety of the distinction that we have taken between proceedings *in rem*, where the charge is merely against the guilty thing itself, and proceedings *in rem*, where the gist of the action is the guilty motive of the claimant—the *fraudulent intent* to evade the revenue laws. "The Burdette" itself had done nothing wrong or illegal. The fraud in the case, for which a forfeiture was sought under the act of December 31, A. D. 1792, Sec. 4, (1 Statutes, p. 289,) consisted in the alleged falsity of the oath of the party procuring the registration of the vessel, who swore that the vessel was wholly owned by citizens of the United States, when it was alleged that he knew at the time that the vessel was in part or in whole owned by an alien. The gist of the case was the *alleged fraudulent intent* of the party to defraud the revenue or registration laws—an intent to be proved or disproved by evidence as to the real ownership of the vessel; and this fact, though the suit was a proceeding *in rem*, the Court unanimously held should be proved *beyond reasonable doubt*, because it involved a forfeiture, based not upon any illegal use or employment of the vessel, but upon the criminal or fraudulent intent of the owner, and the suit was, therefore, substantially and virtually a criminal proceeding, to be governed by the rules of criminal law.

It is to be remarked in this connection that the 48th section of the act of June 30th, 1864, on which the prosecution in the present case is based, is something novel in American Legislation. It is the first instance since the

foundation of our Government that *mere intention*, unaccompanied by any overt act, has been sought to be made a crime, —a crime punishable with total forfeiture of property and a superadded penalty recoverable in a civil suit. If proceedings under such a law do not call for the strictest construction in favor of the citizen, and do not entitle him to all the presumptions of innocence, it is difficult to conceive a case more proper for the application of such rules of interpretation.

An important question in this case was the amount of tax imposed by the act of July 13th, 1866, upon what is designated in the record as "extra long smoking tobacco." It is respectfully submittted that the court in its opinion entirely misconceived the purport of the statute. That this tobacco was made "*in part of stems*" is not questioned; and the act of Congress referred to, in terms too plain to be doubted, imposes a tax of fifteen cents only on tobacco "*made of stems, or in part of stems.*" If such a law allowed room for fraud, that is not a question for the court but for the Legislature. The argument of inconvenience is never to be admitted to contravene the plain letter of the law. On account of a blunder in a tax bill a few years ago, the court of appeals of the State of Maryland decided that the State must go without taxes for a year rather than that the letter of the law should be strained to meet what was considered to be the manifest intent of the law-making power. It is very plain, even to the ordinary comprehension, that the act of July 13th, 1866, intended to distinguish between two general kinds of smoking tobacco, one the leaf tobacco

manufactured by sweetening, stemming and butting the raw material, and the other comprising all inferior classes composed of leaf and stem, of stems alone, or in part of stems, and all imitations thereof. It seems to be conceded in the opinion of the court, that the judges below ought to have instructed the jury as to the amount of tax due on this tobacco; but that, as he did not instruct them that the larger rate was due on it, no harm came to the claimant from his refusal. But if, in fact, the smaller rate was the legal one, then his refusal did injure the claimant. It seems very clear that the court has inadvertently overlooked one or two points in this regard.

The opinion says, in the first place, that the evidence does not show that an equal amount of stems was added to the leaf during the process of manufacture." With due respect, it is submitted that the evidence does clearly and conclusively show that a larger amount of stems was added than was originally taken out. On the 10th page of the Record, lines 4–19, we read as follows: "The witness fur- "ther testified that the manufacture of tobacco, substan- "tially as above described, had been carried on in "claimant's factory for several years prior to said seizure, "the only difference being that, prior to about August 20, "1866, the proportion of the crushed stem to the fillers "(which are the leaves) put in the cutting machines was "about *twenty pounds* of such crushed stem in each machine "box containing *ninety pounds* of fillers and crushed stem; "while, after said date, the average fillers to crushed stems "in such machine box was *two pounds* of fillers to *one pound* "of crushed stem; and that, it having been ascertained by "experiment that the average proportion, by weight, of the

"butts or portions of stem extracted from the leaf for mak-
"ing this extra-long smoking tobacco was one-fourth of the
"weight of the entire leaf, it was intended, in the manu-
"facture of such tobacco, *after August* 20, 1866, *to cut up*,
"*with a given weight of the fillers, at least as much of crushed*
"*stem as would equal in weight the average* quantity of the stems
"taken out of such fillers."

That is, while the average proportion of stem in the entire leaf in its natural state is as *one to four*, the petitioner mixed them in the proportion of *one to two*; that is, he put into the manufactured compound of every leaf *at least* twice as much stem as there was in the leaf in its natural state.

It is true that this evidence, which was evidence from the witness introduced by the prosecution, and the only evidence in the case, "does not show that an equal amount of stems was added to the leaf during manufacture;" but it shows that a *much greater amount* was added, and consequently that the tobacco was much more entitled to be classed as of the kind subject to the inferior rate than would be tobacco in which all the original stem, and that only, was replaced.

The Court in its opinion says, that this practice is not warranted by the act of Congress. The petitioner respectfully submits that it is not *forbidden* by the act of Congress, either by express enactment or by necessary implication. On the contrary, the expression "*tobacco made in part of stems*," fairly interpreted, must mean all such tobacco as is made by the use of any substantial part of the stem in connection with the leaf; and the subsequent expression—"imitations thereof"—corroborates this construction. The

act of Congress does seem directly to warrant the petitioner's course.

The Court in the same connection says, that the practice would open the door to fraud which could seldom or never be exposed. The petitioner respectfully submits, that this statement is not substantiated by anything that appears upon the record; and even if substantiated, is no legal reason for condemning what is lawful in itself, where the statute has not changed the law. Certainly, a man may manufacture tobacco or anything else in any way he pleases, as long as there is no law to prohibit such manufacture; and the fact that it may be difficult to distinguish the different kinds of manufacture is no sufficient reason for judicial legislation against any one or more of the modes of manufacture. Effective operation must be given to each section, line and word, of a statute; but the reasoning and conclusion of the court *practically repeals* that portion of the statute in question, which provides for a tax of fifteen cents on a certain species of manufactured article and *makes it subject to a tax of forty cents*, on the admitted ground that it may be difficult and embarrassing to determine as between the two different species for which the statute has provided the two different rates of taxation.

The Court in its opinion entirely ignored the constitutional question involved in this case. The petitioner most earnestly and respecfully submits, that the section of the act of June 30th, 1864, under which this prosecution was instituted, is not only an arbitrary and tyrannical exercise of legislative power, but one not warranted by the Constitution of the United States. That instrument is positive and specific in its requirement, that no seizures shall be

made, but in pursuance of warrants issued upon probable cause, and supported by oath or affirmation. The record does not show that any such preliminaries were observed in the present case; and the act of Congress ignores the Constitution as much as if that instrument were a dead letter.

In the case of the Commonwealth *vs.* Albro, (1 Gray, 49) it was said: "The defect of the statute is, that it prescribes measures, without the precautions required by the Constitution for the safe execution of the law." And on account of such defect, the statute in question was adjudged to be unconstitutional.

R. T. Merrick,
M. F. Morris.